Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlords on November 19, 2019 (the "Application"). The Landlords sought compensation for monetary loss or other money owed, to keep the security and pet damage deposits and reimbursement for the filing fee.

The Landlords and Tenants appeared at the hearing. I explained the hearing process to the parties who did not have questions when asked. The parties provided affirmed testimony.

Both parties submitted evidence prior to the hearing. I addressed service of the hearing package and evidence and no issues arose.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered all testimony provided and the documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Are the Landlords entitled to compensation for monetary loss or other money owed?

2. Are the Landlords entitled to keep the security and pet damage deposits?

3. Are the Landlords entitled to reimbursement for the filing fee?

Background and Evidence

The Landlords testified that they signed a written tenancy agreement and sent it to the Tenants, but the Tenants never signed it. The Tenants testified that there was no written tenancy agreement signed.

The parties agreed a verbal tenancy agreement was formed between them in relation to the rental unit. The parties agreed the tenancy started September 15, 2019. The Landlords testified that the tenancy was originally for a fixed term from September 15, 2019 to December 15, 2019 but the Tenants asked to extend it to February 15, 2020 and the Landlords agreed. The Tenants testified that the tenancy was for a fixed term from September 15, 2019 to December 15, 2019 and an extension was discussed but not agreed on.

The parties agreed rent was $3,000.00 per month due on the 15th day of each month. The parties disagreed about what was included in rent. The parties agreed a $1,500.00 security deposit and $1,500.00 pet damage deposit were paid. The Landlords confirmed they still hold these.

The Tenants confirmed the rental unit was their temporary residence and only residence at the relevant time.

The parties agreed the tenancy ended October 22, 2019.

The parties agreed the Tenants provided their forwarding address to the Landlords by email November 04, 2019.

The Landlords acknowledged they did not have an outstanding monetary order against the Tenants at the end of the tenancy. The Landlords acknowledged the Tenants did not agree in writing at the end of the tenancy that the Landlords could keep some or all of the security or pet damage deposits.

In relation to a move-in inspection, the Landlords testified that the parties walked around the rental unit but did not do a Condition Inspection Report (CIR). The Landlords confirmed the Tenants were not offered two opportunities to do a move-in inspection. The Tenants agreed there was no CIR done and they were not offered two opportunities to do a move-in inspection.

In relation to a move-out inspection, the Landlords testified that a CIR was not done and the Tenants were not offered two opportunities to do a move-out inspection. The Tenants agreed there was no CIR done and they were not offered two opportunities to do a move-out inspection.

The Landlords sought compensation for one month of lost rent.

The Landlords provided the following outline of events. The rental unit was put on a vacation rental website in the fall of 2017. The Tenants rented the unit as outlined above. On October 15, 2019, the Landlords did not hear from the Tenants and sent them a text. The Tenants replied saying they were not sure they were going to stay at the rental unit and would let the Landlords know in 48 hours. On October 16, 2019, the Tenants paid the Landlords $750.00 stating this was for one week of rent and they would be leaving October 22, 2019. The Tenants vacated the rental unit October 22, 2019.

The Landlords further testified as follows. The Tenants had put items from the rental unit in the attic. These items had to be brought back down once the Tenants vacated. The Landlords then posted the rental unit on a rental website the weekend after the Tenants vacated. The rental unit was posted for the same rent amount and as a minimum one-month rental. The rental unit had been blocked as unavailable on the vacation rental website for three months when the Tenants rented it. The rental unit was put back on the vacation rental website as available the weekend after the Tenants vacated. It was posted as a vacation rental at $199.00 per night for two people plus a cleaning fee. After the Tenants vacated, there was a booking from the vacation rental website on November 25, 2019 for $666.39.

The Landlords submitted that the Tenants should have paid rent or given more than one week notice that they were vacating.

The Tenants testified as follows. They have a very sick son who has a compromised immune system. They were assured the rental unit was clean. There were mice in the rental unit. They could not stay in the rental unit due to the mice.

The Tenants relied on an October 09, 2019 email in evidence as their notice outlining a breach of a material term of the tenancy agreement.

After being questioned about their notice and advised of the requirements in the *Residential Tenancy Act* (the "*Act*") and Policy Guideline, the Tenants changed their

earlier testimony about the term of the tenancy and took the position that they did not think it was a fixed term tenancy and thought it was still a nightly or weekly tenancy. Tenant C.C. then said it was the Tenants' intent to stay for the entire term, but they could not live at the rental unit with their child. The Tenants then took the position that the fixed term was never fully agreed to.

The Tenants submitted that there was no loss to the Landlords arising out of the Tenants vacating early because the rental unit is a summer cottage and the income the Landlords were getting from their rental was over and above what the Landlords would usually have gotten.

I have reviewed all of the documentary evidence submitted.

The Landlords submitted evidence showing when the rental unit was rented through the vacation rental website.

The Landlords submitted a text between the parties in which the Tenants indicate they will move in September 15th and move out December 15th as discussed the previous day.

Both parties submitted the Tenants' email dated October 09, 2019.

Both parties submitted the October 16, 2019 email from the Tenants stating they will move out October 22, 2019.

Both parties submitted a text from the Tenants stating it is unlikely they will be renewing for another month due to mice and that they will let the Landlords know once they decide what to do.

The Tenants provided written submissions. These refer to ending the tenancy for a material breach by the Landlords and state that the Tenants ended the tenancy under section 45(3) of the *Act*.

Analysis

I note at the outset that the rental unit was posted on a vacation rental website. However, the Tenants agreed the rental unit was used as their temporary residence and was their only residence at the relevant time. The rental unit was not used for vacation

or travel. The parties agreed a tenancy agreement was formed between them in relation to the rental unit. I am satisfied the *Act* applies.

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 and 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 security and pet damage deposits at the end of a tenancy.

Based on the testimony of both parties, I am satisfied the parties did not do proper move-in and move-out inspections and am satisfied the Tenants were not offered two opportunities to do these inspections. Therefore, I find the Tenants did not extinguish their rights in relation to the security or pet damage deposits under sections 24 or 36 of the *Act*.

It is not necessary to determine whether the Landlords extinguished their rights in relation 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 and the Landlords have claimed for loss of rent.

Based on the testimony of both parties, I accept that the tenancy ended October 22, 2019.

Based on the testimony of both parties, I accept that the Tenants provided their forwarding address to the Landlords November 04, 2019.

Pursuant to section 38(1) of the *Act*, the Landlords had 15 days from November 04, 2019 to repay the security and pet damage deposits or file an Application for Dispute Resolution claiming against them. The Application was filed November 19, 2019, within the time limit.

I find the Landlords complied with section 38(1) of the *Act* in relation to the security deposit.

Policy Guideline 31 deals with pet damage deposits and states:

> **When can a landlord keep the deposit?**
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> …
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> At the end of a tenancy, if the tenant agrees in writing, the landlord may keep all or part of the pet damage deposit.
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> At the end of a tenancy, the landlord may keep all or a part of the pet damage deposit to pay an amount previously awarded by an arbitrator for damage caused by a pet and which was still unpaid at the end of the tenancy.
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> The landlord may apply to an arbitrator to keep all or a portion of the deposit but only to pay for damage caused by a pet. The application must be made within the later of 15 days after the end of the tenancy or 15 days after the tenant has provided a forwarding address in writing…
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> (emphasis added)

Pet damage deposits are security held for damage caused by a pet. Here, the Landlords have not sought to keep the pet damage deposit for damage caused by a pet but for loss of rent. As indicated in Policy Guideline 31, the Landlords were not permitted to claim against the pet damage deposit for loss of rent. In relation to the pet damage deposit, the Landlords had two options at the end of the tenancy. To return the pet damage deposit in full or claim against it for pet damage within 15 days of November 04, 2019. The Landlords did neither. I find the Landlords failed to comply with section 38(1) in relation to the pet damage deposit. Given the testimony of the parties, the exceptions outlined in section 38(3) and (4) do not apply. Therefore, pursuant to section 38(6) of the *Act*, the Landlords cannot claim against the pet damage deposit and must return double the amount of the pet damage deposit to the Tenants.

I note that there is no interest owed on the security or pet damage deposits as the amount owed has been 0% since 2009.

The Landlords are still permitted to seek compensation and I consider that now.

Loss of rent

Section 7 of the *Act* states:

> 7 (1) If a…tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying…tenant must compensate the [landlord] for damage or loss that results.
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> (2) A landlord…who claims compensation for damage or loss that results from the [tenant's] non-compliance with this Act, the regulations or their tenancy agreement 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.

An issue arose at the hearing in relation to the term of the tenancy agreement. I am satisfied this was a fixed term tenancy starting September 15, 2019 and ending December 15, 2019. The parties were specifically asked about the term of the tenancy at the outset of the hearing. Both parties agreed it was a fixed term tenancy starting September 25, 2019 and ending December 15, 2019. I do not find whether it was extended relevant. The original position of the parties that this was a fixed term tenancy is supported by the text message in evidence where the Tenants state they will move in September 15th and move out December 15th as discussed.

It was not until well into the hearing, when I addressed section 45(3) of the *Act* and Policy Guideline 8 about a breach of a material term of the tenancy agreement that the Tenants changed their testimony and position about whether this was a fixed term

tenancy. The argument that this was not actually a fixed term tenancy is not in the Tenants' written submissions. This argument was not made until the Tenants were questioned on their position that they ended the tenancy in accordance with the *Act*. I do not accept the Tenants' change of testimony and position. I do not find it credible. If this was not a fixed term tenancy, I would expect the Tenants to not have agreed it was a fixed term tenancy when specifically asked about this at the outset of the hearing.

Nor does it accord with common sense that the Tenants would be paying rent monthly for a nightly or weekly tenancy.

Section 45 of the *Act* sets out when and how tenants can end a tenancy. Section 45(1) of the *Act* applies to periodic tenancies. Section 45(2) of the *Act* applies to fixed term tenancies and states:

> (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
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> (a) is not earlier than one month after the date the landlord receives the notice,
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> (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
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> (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.

Section 45(3) of the *Act* 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.

Policy Guideline 8 outlines the requirements for ending a tenancy for breach of a material term and states:

> To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement2, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

The Tenants relied on the October 09, 2019 email as their notice under section 45(3) of the *Act*. I have read the email. I do not find it complies with Policy Guideline 8 or section 45(3) of the *Act*. The email does not say anything about a breach of a material term of the tenancy agreement. Nor does it say the Tenants will end the tenancy if a breach is not corrected.

I am not satisfied the Tenants complied with section 45(3) of the *Act*.

I am satisfied based on the documentary evidence that the Tenants sent an email October 16, 2019 stating they would vacate October 22, 2019. This notice does not comply with any of the requirements set out in section 45(2) of the *Act*. I find the Tenants breached section 45 of the *Act* by ending the fixed term tenancy early.

I do note that the result would have been the same even if this was a periodic tenancy as the Tenants' notice did not comply with section 45(1) of the *Act* either. The October 16, 2019 email would have ended the tenancy December 14, 2019 pursuant to sections 45(1) and 53(2) of the *Act*.

I am satisfied the Landlords lost rent due to the breach. I do not find the point to be whether the Landlords would have rented the unit to others had the Tenants not rented it as suggested by the Tenants. The point is that the Landlords would have received rent from the Tenants up until December 15, 2019 if the Tenants had not breached the *Act* and ended the tenancy agreement early.

There is no issue that rent was $3,000.00 per month due on the 15th day of each month. The Tenants owed $3,000.00 for October 15th to November 15th and $3,000.00 for November 15th to December 15th. There is no issue that the Tenants paid $750.00 for the period October 15th to November 15th. I am satisfied based on the documentary evidence that the Landlords rented the unit November 25, 2019 for $666.39. Therefore, I am satisfied the Landlords lost $2,250.00 for October 15th to November 15th and $2,333.61 for November 15th to December 15th. I am satisfied the Landlords lost $4,583.61 in total due to the Tenants ending the tenancy early.

I accept the testimony of the Landlords that they posted the rental unit on a rental website and indicated it was available on the vacation rental website the weekend after the Tenants vacated. I am satisfied the Landlords took reasonable steps to mitigate the loss caused by the Tenants' breach.

I am satisfied the Landlords are entitled to recover $3,000.00 in loss of rent which is less than the actual loss but is what the Landlords sought.

Filing Fee

Given the Landlords were successful in the Application, I award them reimbursement for the $100.00 filing fee pursuant to section 72(1) of the *Act*.

Summary

In summary, the Landlords are entitled to $3,100.00. The Landlords hold the $1,500.00 security deposit and $1,500.00 pet damage deposit. Further, the Landlords owe the Tenants double the pet damage deposit. Therefore, I consider the Landlords to hold $4,500.00 in deposits from the Tenants. The Landlords can keep $3,100.00 of these pursuant to section 72(2) of the *Act*. The Landlords must return $1,400.00 of these to the Tenants. The Tenants are issued a monetary order for this amount.

Conclusion

The Landlords owe the Tenants double the pet damage deposit. Therefore, the Landlords are considered to hold $4,500.00 in deposits from the Tenants. The Landlords are entitled to compensation in the amount of $3,100.00. The Landlords can keep $3,100.00 of the deposits. The Landlords must return $1,400.00 of the deposits to the Tenants. The Tenants are issued a Monetary Order for this amount. If the Landlords do not return $1,400.00, the Order must be served on the Landlords. If the

Landlords do not comply with the Order, it may be filed in the Small Claims division of the Provincial Court 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 15, 2020

Residential Tenancy Branch