Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding J110 Freecorp Holdings Ltd. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, MNRL-S, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord under the Residential Tenancy Act, (the "*Act*"), for a monetary order for unpaid rent, for a monetary order for damages, permission to retain the security deposit and an order to recover the cost of filing the application. The matter was set for a conference call.

Both Tenants, a translator and the Landlord's Agent (the "Landlord") attended the hearing and were each affirmed to be truthful in their testimony. The Tenants and the Landlord were provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to monetary order for unpaid rent and utilities?
- Is the Landlord entitled to monetary order for damage?
- Is the Landlord entitled to retain the security deposit for this tenancy?
- Is the Landlord entitled to recover the filing fee for this application?

Background and Evidence

While I have turned my mind to all of the accepted documentary evidence and the testimony of the parties, only the details of the respective submissions and/or arguments relevant to the issues and findings in this matter are reproduced here.

The tenancy agreement records that this tenancy began on July 17, 2019, as a one-year fixed term tenancy. Rent in the amount of $1,990.00 was to be paid by the first day of each month and the Landlord had been given a $995.00 security deposit at the outset of the tenancy. The Landlord provided a copy of the tenancy agreement into documentary evidence.

Both parties agreed that the that the Tenants served the Landlord with their notice to end their tenancy on April 20, 2020, listing an effective end of tenancy date of April 30, 2020. The Landlord and Tenants agreed that the Tenants had provided their forwarding address and vacated the rental unit, in accordance with their notice, as of April 30, 2020.

The Landlord testified that they started advertising for to locate a new renter for the rental unit as soon as they received the Tenants' notice to end the tenancy, but that as of the date of this hearing, the rental unit was still unoccupied. The Landlord is requesting a monetary order in the amount of $1,990.00, for their loss in rental income for May 2020, due to the short notice to end tenancy they received for the Tenants.

The Tenants disagreed that they should have to pay the May 2020 rent, as they had provided as much notice as possible and that they are experiencing financial difficulties due to the loss of income caused by the COVID-19 pandemic.

The Landlord testified that they are also seeking to enforce section 6 of the tenancy agreement, requesting $995.000 in liquidated damages, due to the Tenants' breach of the fixed term tenancy. The Landlord testified that the liquidated damages, of $995.00, is a penalty due to the Landlord for the tenants breaching their tenancy agreement.

The Tenants disagreed that they should be charged this penalty as they only breached their tenancy agreement due to financial hardship caused by the COVID-19 pandemic.

The Landlord testified that they are also seeking to recover $32.00 in an NSF fee they were charged, when the Tenants' May 2020 rent cheque was retuned to the NSF. The Landlord was asked, by this Arbitrator, why they had attempted to cash a post-dated

rent cheque after the tenancy had ended. The Landlord testified that they believed that the May rent was due for this tenancy, due to the short notice given by the Tenants, so they cashed the post-date cheque they were holding for May 2020.

The Tenant's testified that the Landlord had not returned their post-dated cheques for this tenancy and the Tenants requested that all their post-dated cheques be returned to Tenant J.L.P. during this hearing.

The Landlord agreed, during these proceedings, that they would return the post-date cheques for this tenancy to the Tenant J.L.P. as requested.

The landlord testified that they are also claiming for $157.50 in carpet cleaning and $150.00 in suite cleaning, that the Tenant had asked the Landlord to have completed for them at the end of this tenancy.

The Tenants agreed that they had asked the Landlord to have rental unit cleaned for them at the end of this tenancy and agreed to the requested charges of $157.50 for the carpet cleaning and $150.00 in suite cleaning.

Analysis

Based on the above, testimony and evidence, and on a balance of probabilities, I find as follows:

I find that these parties entered into a one-year fixed term tenancy that started on July 17, 2019, in accordance with the Act.

I accept the agreed-upon testimony of these parties, and I find that on April 20, 2020, the Tenants served the Landlord with written notice to end their tenancy early as April 30, 2020. Section 45(2)(b) of the Act states that a tenant cannot end a tenancy agreement earlier than the date specified in the tenancy agreement.

> **Tenant's notice**
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> **45**(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,

> (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.

I find that the tenancy could not have ended in accordance with the *Act* until July 16, 2020. I find that the Tenants breached section 45 of the *Act* when they issued notice to the Landlord to end the tenancy as of April 30, 2020.

The landlord has requested compensation, in the amount of $1,990.00, to recover their loss of rental income for May 2020. Awards for compensation due to damage are provided for under sections 7 and 67 of the *Act.* A party that makes an application for monetary compensation against another party has the burden to prove their claim. The Residential Tenancy Policy Guideline #16 Compensation for Damage or Loss provides guidance on how an applicant must prove their claim. The policy guide states the following:

> "The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. 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.

In this case, I find that the Tenants' breach of section 45 of the *Act* resulted in a loss of rental income to the Landlord. I also find that the Landlord has provided sufficient evidence to prove the value of that loss and that they took reasonable steps to minimize the losses due to the Tenants' breach. Therefore, I find that the Landlord has established an entitlement to the recovery of the loss of rental income for May 2020, and I grant the Landlord an award of $1990.00, for the recovery of their lost rental income.

I also accept the agreed-upon testimony of these parties that the tenants owe the Landlord $157.50 for cleaning the carpets and $150.00 for cleaning the rental unit for them at the end of this tenancy. Accordingly, I award the Landlord $307.50, in the recovery of their cost to clean the rental unit at the end of this tenancy.

The Landlord had claimed for $32.00 in the recovery charged that the Landlord received from their bank for the return of the Tenant May 2020 rent cheque for this tenancy. As it has already been determined that this tenancy ended on April 30, 2020, I find that the Landlord had no right to attempt to cash the May 1, 2020, post-dated rent cheque they were holding for this tenancy. Consequently, I find that the Landlord is not entitled to the recovery of an NSF bank charge for the Tenant's return cheque, as they did not have the right to attempt to cash post-dated rent cheques for a tenancy that had legal ended.

I acknowledged the Landlord's argument that they believed that this tenancy did not end until May 31, 2020, and that is why they attempted to cash the post-dated cheques they were holding for May 2020. However, I find that the Landlord's argument is legally flawed. A tenancy ends on the date that a tenant returns possession of a rental unit to a landlord. The financial obligation to cover rent for that rental unit may extend past the end of the tenancy date, but that does not extend the legal end of tenancy date.

The Landlord is also requesting to enforce the liquidated damages clause contained in this tenancy agreement, in the amount of $995.00. The Residential Tenancy Policy Guideline # 4 speaks to liquidated damages, stating the following:

> "*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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> *There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:*
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> - *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.*
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> *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.*
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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.*
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> *If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover."*

I accept the testimony of the Landlord that the liquidated damages clause contained in this tenancy agreement is a penalty that the Landlord is charging these Tenants due to their breach of the tenancy agreement. As the sum of the liquidated damages in the tenancy agreement does not represent a genuine loss, but in fact, a penalty as testified to by the Landlord, I find the liquid damages clause of this tenancy agreement to constitute a penalty and is therefore unenforceable. Accordingly, I dismiss this portion of the Landlord's claim in its entirety.

Regarding the security deposit for this tenancy, section 38(1) of the *Act* gives a landlord, 15 days from the later of the day the tenancy ends or the date the landlord receives the tenant's forwarding address in writing to file an Application for Dispute Resolution claiming against the deposit or repay the security deposit to the tenant.

> ***Return of security deposit and pet damage deposit***
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> ***38*** *(1) Except as provided in subsection (3) or (4) (a), within 15 days after the later of*
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> *(a)the date the tenancy ends, and*
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> *(b)the date the landlord receives the tenant's forwarding address in writing,*
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> *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.*

I find that this tenancy ended on April 30, 2020, the agreed-upon date the Tenants had vacated the rental unit and provided their forwarding address to the Landlord.

Accordingly, the Landlord had until May 15, 2020, to comply with section 38(1) of the *Act* by either repaying the deposit in full to the Tenants or submitting an Application for Dispute Resolution to claim against the deposit.

I have reviewed the Landlord's application for this hearing, and I find that the Landlord submitted her Application for Dispute resolution to claim against the deposit on June 11, 2020, 37 days after the statutory timeline had expired. I find that the Landlord breached section 38(1) of the *Act* by not filing their claim against the deposit within the statutory timeline.

I acknowledged the Landlord's claim that they believed that this tenancy did not end until May 31, 2020; however, I find that the Landlord's argument is legally flawed. A tenancy ends on the date that a tenant returns possession of a rental unit to a landlord. The financial obligation in relation to the tenancy agreement for that tenancy may extend past the end of tenancy date, but that does not extend the end of tenancy date.

Section 38 (6) of the *Act* goes on to state that if the landlord does not comply with the requirement to return the deposit within the 15 days, the landlord must pay the tenant double the security deposit.

> ***Return of security deposit and pet damage deposit***
> ***38*** *(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.*

Therefore, I find that pursuant to section 38(6) of the *Act*, the value of the security deposit for this tenancy has doubled in value and is now worth $1,990.00.

Overall, I award the Landlord a monetary order in the amount of $407.50; consisting of $1,990.00 in rent for May 2020, $157.50 for carpet cleaning, $150.00 for suite cleaning, and $100.00 in the recovery of the filing fee for this application, less $1,990.00 in the doubled vale of the security deposit that the Landlord is holding for this tenancy.

Section 72 of the *Act* gives me the authority to order the repayment of a fee for an application for dispute resolution. As the Landlord has been partially successful in this application, I find that the Landlord is entitled to the recovery of their $100.00 filing fee paid for their application.

Conclusion

I find for the Landlord under sections 67 and 72 of the Act and grant the Landlord a **Monetary Order** in the amount of **$407.50**. The Landlord is provided with this Order in the above terms, and the Tenant must be served with this Order as soon as possible. Should the Tenant fail to comply with this Order, this Order 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 *Residential Tenancy Act*.

Dated: July 9, 2020

Residential Tenancy Branch