Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ONNI Property Management Services LTD. and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

The landlord filed an application for dispute resolution (the "Application") on July 10, 2020. They seek an order for compensation for monetary loss or other money owed. The landlord applies to use the security deposit towards compensation on these claims. Additionally, they seek to recover the filing fee for the Application.

They presented that they delivered the notice of this hearing to the tenant via registered mail. This was to the tenant's forwarding address they provided at the end of the tenancy. The tenant stated they received the notice and prepared evidence from the landlord "sometime in summer." The tenant presented no documentary evidence in advance for this hearing.

The matter proceeded by way of hearing pursuant to section 74(2) of the *Residential Tenancy Act* (the "*Act*") on November 2, 2020. Both parties attended the conference call hearing. I explained the process and offered both parties the opportunity to ask questions. Both parties had the opportunity to present oral testimony and present evidence during the hearing.

Issue(s) to be Decided

Is the landlord entitled to a money owed or compensation for damage or loss, other money owed, and unpaid rent pursuant to section 67 of the *Act*?

Is the landlord entitled to recover the filing fee for this Application pursuant to section 72 of the *Act*?

Background and Evidence

The landlord submitted a copy of the Residential Tenancy Agreement that both parties signed on September 6, 2019. The agreement is clear that the period of the tenancy was fixed, starting on October 1, 2019 and ending on September 30, 2020. It is specified that at the end of the term, the tenancy will continue on a month-to-month basis. The rent amount was $2,400. The tenant paid a security deposit of $1,200 on September 6, 2019.

In the hearing, the tenant clarified that the rent amount monthly was $2,458 per month. The extra portion is the “utilities fixed monthly rate”, as it appears in the additional terms attached to the tenancy agreement.

The tenancy ended on June 29, 2020. This was before the end of the fixed term. The tenant gave their notice to end tenancy to the building manager on May 31, 2020.

A page of additional terms accompanied the agreement. There is a clause that specifies: “if the Tenant ends the tenancy prior to the end of the term. . . the Tenant will pay to the Landlord the sum of $1,200.00 as liquidated damages.” This is stated to be: “an agreed pre-estimate of the landlord’s cost of re-renting the Premises and must be paid in addition to any other amounts owed by the Tenant to the Landlord.”

In their Application, the landlord states: “the tenant agreed to pay a liquidated damages clause to cover costs associated with re-renting the unit.” In the hearing, the tenant acknowledged they “broke the lease” and acknowledged the amount embedded in the clause. The landlord submits the amount owing on this portion is $1,200.

The landlord spoke to the efforts to re-rent the unit. They had to do this at a reduced rental amount for one month after the tenant moved out. They did so to enable the parties to “go separate ways as soon as possible.”

The tenant countered this submission by outlining their work on assisting the landlord to re-rent the unit. This involved posting ads online “immediately” and vetting applications of parties interested in renting the unit. This was in response to the building caretaker’s direct statement to the tenant: “It’s your responsibility to get this rented.” For the tenant this was work as a “middleman” and they ensured the place was “clean and presentable” and “never denied [potential renters] once to show place.” Additionally, the tenant hired the “clean-out specialist” that the landlord wanted them to hire upon the end of tenancy.

Another page "Additional Terms B" was submitted by the landlord. The landlord submitted this is an "incentive claim." It lists the 13th month free rent, a "tandem stall" fee for one year ($75 after), and 2 small storage lockers free for one year ($30 onwards each). The document also contains the clause: "If you're in breach of your tenancy, or have any arrears throughout the duration of your tenancy, this agreement/offer will be void." The document bears the signature of the tenant on September 6, 2019; however, the landlord signature space is empty and undated. The landlord submits the amount owing on this portion is $1,215.00: $675 for parking; $540 for the lockers. An email from the landlord shows they gave this breakdown to the tenant on June 15, 2020.

On this portion of the claim, the tenant submitted the building manager – the party who signed the tenancy agreement on behalf of the landlord – only said "it's for free" in reference to the specific items listed. They maintained in the hearing that the building manager never stated the amounts were to be paid back should the tenancy end early. The tenant stated: "it just doesn't say – nowhere does it say 'incentive will have to be paid back'".

The amount originally claimed by the landlord for a curtain rod on their Application -- $125 – was resolved and the landlord has dropped this issue.

In the hearing, the tenant stated they gave the landlord authorization to retain the security deposit as recompense for amounts owing. The landlord responded to this in the hearing by stating they "can't authorize the use of the security deposit."

The landlord also claims $1,228 for an outstanding rent amount owing. In the last month of the tenancy, the tenant paid one-half the rent amount on June 4, for $1,230. The landlord provided an email dated June 5 that sets this out to the tenant.

Analysis

The *Act* section 26 sets out the duty of a tenant to pay rent:

> A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

The tenant acknowledged the outstanding rent amount owing. On this basis, I find the landlord is entitled to recompense of the unpaid rent portion of their claim.

The *Act* section 6 subsection 3 provides that: “A term of a tenancy agreement is not enforceable if . . .(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.”

On the “incentive payback” clause as it appears in “Additional Terms B” of the tenancy agreement, the tenant clearly takes issue with the charges accrued. On this portion, I find the landlord is not entitled to any compensation for the items listed there.

The agreement itself on page 6 of 6 specifies that when including an addendum the tenancy agreement must note the number of pages and the number of terms – since the agreement itself does not include this information none of the documents the landlord submitted as the addendum form a valid portion of the agreement because it is unclear what the addendum is and what it is not. There are 3 documents: the “Tenancy Agreement Additional Terms”; “Residential Tenancy Agreement Addendum”; and “Additional Terms B”. The tenancy agreement itself indicates there is an addendum; however, with no other information and since only one document is entitled ‘Addendum’ it is not clear which of 3 documents is that which is referred to in the tenancy agreement.

For the “Additional Terms B” document itself, it is unclear what the consequences are if the tenancy ends before the fixed term other than to say that the tenant will no longer receive these benefits. The statement only provides that “this agreement/offer will be void” – it does not state that the tenant must pay the landlord any amounts if they breach the main tenancy agreement. I make reference to section 6(3) of the *Act* when considering this in terms of the rights and obligations a statement may purport to assign.

Even if I accept the “Additional Terms B” document as an addendum to the tenancy agreement, and if it stated clearly that the tenant would have to pay certain amounts back to the landlord, the wording itself is imprecise. The value outlined in the document implies the value of the “tandem stall” is $75 *per year* and the small storage locker is $30 *per year*. With reference to section 6(3) of the *Act*, it is not clear that the amount reflects a *monthly* amount for each of $75 and $30.

Finally, this “Additional Terms B” page bears the tenant’s signature; however, it does not show the landlord signed. The tenant maintained in the hearing that the building manager did not explain this term to them fully at the time of signing. Such as it is, I find it more likely than not that no explanation was given because it is not signed by the landlord. This submission of the tenant was not met with evidence to the contrary from the landlord. Given the lack of clear communication on rights and obligations, in tandem with no verbal explanation by the landlord, this term is not enforceable.

For these reasons, I find the landlord shall not collect any compensation for this portion of their claim.

The Residential Policy Guideline 4 on Liquidated Damages is in place to provide a statement of the policy intent of the *Act*. It provides: “The amount [of damages payable] 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.”

Here, the clause in question states it is “an agreed pre-estimate of the landlord’s cost of re-renting the Premises and must be paid in addition to any other amounts owed by the Tenant to the Landlord.”

I find a framework for this clause is not in place. It appears arbitrary and is not a genuine pre-estimate of loss. As provided for in section 6(3) of the *Act*: “A term of a tenancy agreement is not enforceable if . . .(c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.”

Moreover, I cannot rectify “an agreed pre-estimate of the landlord’s cost of re-renting the premises” with the responsibility for finding new tenants being placed by the landlord onto the shoulders of the tenant. The tenant presented that the building manager stated this to them explicitly, and this term was not directly challenged by the landlord. Rather, the landlord stated in the hearing that “the landlord telling the tenant to re-rent is not wildly inappropriate.”

Reading further in the addendum clause 3, it states: “Landlord will take all reasonable steps to ensure the Premises are re-rented as soon as possible in order to mitigate any damages for breach of the Tenancy Agreement by the Tenant.” Strictly speaking, it does not state the tenant is responsible for any duties toward re-renting the unit.

In sum, I find the liquidated damages clause is invalid in that it is punitive in nature. I make no award for the amount it sets out. I find the clause is not a genuine pre-estimate of loss to the landlord where there are duties left to the tenant which offset any cost of re-renting. Secondly, the addendum does not explicitly assign these duties to the tenant.

The tenant submitted that they offered the security deposit to the landlord for the outstanding amount of rent owing. Given there is no evidence of a written offer from the tenant to the landlord, the landlord is correct that they did not have proper authorization to apply the security deposit. However, in this hearing they are now applying to do so.

The *Act* section 72(2) gives an arbitrator the authority to make a deduction from the security deposit held by the landlord. The landlord has established a claim of $1,288.00. After setting off the $1,200 security deposit amount, already retained by the landlord, there is a balance of $88.00. I am authorizing the landlord to keep the security deposit amount and award the balance of $88 as compensation to them.

As the landlord was only partly successful in their Application, I find they are not entitled to recover the filing fee.

Conclusion

Pursuant to sections 67 and 72 of the *Act*, I grant the landlord a Monetary Order in the amount of $88.00 for compensation set out above. 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 *Act*.

Dated: November 4, 2020

Residential Tenancy Branch