



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

TT: MNDCT, MNSD, FFT

LL: MNDCL-S, MNDL-S, MNRL-S, FFL

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the “Act”).

The landlord applied for:

- A monetary award for damages and loss pursuant to section 67;
- Authorization to retain the deposit for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the tenant pursuant to section 72.

The tenant applied for:

- A monetary award for damages and loss pursuant to section 67;
- A return of all or a portion of the deposit for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the landlord pursuant to section 72.

Both parties were represented at the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by their family member who acted as their agent (the “landlord”).

As both parties were present service was confirmed. The parties each testified that they received the respective materials and based on their testimonies I find each party duly served in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is either party entitled to a monetary award as claimed?
Is either party entitled to the deposit for this tenancy?
Is either party entitled to recover the filing fee from the other?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

This fixed-term tenancy began in September 2018 and was scheduled to end on September 30, 2020. Monthly rent was \$3,400.00 payable on the first of each month. A security deposit of \$1,700.00 was collected at the start of the tenancy and is still held by the landlord. The rental unit is a suite in a new multi-unit building. Other multi-unit buildings are being constructed in adjoining properties.

A copy of the tenancy agreement was submitted into evidence. The addendum to the tenancy agreement provides a liquidated damage clause which entitled the landlord to a sum of \$1,700.00, as a pre-estimate of the cost of re-renting the rental suite should the tenant end the fixed-term tenancy prior to the its term.

The tenant gave lengthy testimony that the landlord failed to ensure quiet enjoyment of the rental unit as there was ongoing construction in the area with accompanying noise, dust and invasion of privacy and odours of marijuana smoke in the unit. The tenant characterizes the landlord as unprofessional and unresponsive and that they suffered multiple detrimental health effects due to their living condition. The tenant says that the cumulative effect of all of the deficiencies is that the landlord breached a material term of the tenancy agreement giving rise to the tenant's right to end the tenancy earlier than the fixed term.

The landlord submits that construction has been ongoing prior to the tenancy commencing and that they believe work is occurring in a reasonable manner given the scale of the construction project. The landlord has provided some reduction in rent in response to the tenant's complaints. The landlord testified that they have inspected and attempted to address the tenant's complaints but have found no issue with odour in the rental unit and that the construction noise is an unfortunate but unavoidable side-effect of construction work in the area.

The parties engaged in ongoing conversation about ending the tenancy before its full term but were unable to come to an agreement. The tenant ultimately gave written notice by an email of February 29, 2020 to end the tenancy on March 31, 2020.

The parties agree that no move-out condition inspection report was prepared by the landlord and the tenant together. The landlord explained that this was due to the ongoing COVID19 pandemic at the time of the scheduled move-out inspection. The landlord's agent failed to attend at the scheduled time to participate in a move-out inspection together with the tenant.

The tenant provided a forwarding address in writing on or about April 3, 2020. The tenant says that they did not provide the landlord with written authorization that they may retain any portion of the deposit.

The landlord submits that the rental unit required some repairs and maintenance work due to damages caused by the tenant during the tenancy. The landlord submits that these issues include damage to bathroom fixtures for which they required professional repairs be performed. The landlord testified that they have been informed that the damages stem from misuse of the fixtures and facilities and therefore believe the costs of repairs arise due to the tenant's actions. The landlord submitted into documentary evidence correspondence from their insurance agents and investigators stating that the probable cause of the damage is misuse of the fixtures and appliances in the bathroom. The landlord testified that there was significant water damage to the rental unit and that they incurred significant costs for repairs. The landlord submitted invoices showing that the total cost of work done is \$7,425.04.

The tenant disputes that the damage is attributable to their misuse of the facilities and submits that they are due to inherent deficiencies in the rental property.

The landlord submits that once the repairs and maintenance was completed on or about April 20, 2020 they advertised the rental property and attempted to find a new occupant. The landlord says that despite their best efforts, due to the ongoing COVID19 pandemic they were unable to find a new occupant until August 20, 2020. The landlord therefore seeks rental income losses for the period they were unable to find a new occupant.

Analysis

Section 36 of the Act provides that the right of a landlord to claim against a security deposit for damage to residential property is extinguished if they do not offer the tenant 2 opportunities to participate in a move-out inspection and prepare a condition inspection report.

Furthermore, section 38 of the *Act* requires the landlord to file for dispute resolution for authorization to retain a security deposit within 15 days of the end of a tenancy or a tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award pursuant to section 38(6) of the *Act* equivalent to double the value of the security deposit.

In the present case I accept the evidence of the parties that the landlord did not participate in a move-out inspection on the scheduled date as required under the *Act*. While I understand the landlord's agent's concerns due to the ongoing COVID19 pandemic, there were no Ministerial Orders or exemptions in effect at the time that excused the landlord from completing their obligations under the *Act*. I find that the landlord did not complete a move-out condition inspection report together with the tenant and consequently extinguished their right to claim against the deposit for this tenancy.

In any event, the parties gave evidence that the tenant provided a forwarding address on April 3, 2020 and the landlord did not file their application for dispute resolution until April 30, 2020, outside of the 15 days provided under the *Act*.

Based on the undisputed evidence before me, I find that the landlord has extinguished their right to claim against the security deposit by failing to complete a condition inspection report in accordance with the *Act* and has failed to return the deposit in full within 15 days of receiving the tenant's forwarding address. I accept the tenant's evidence that they have not waived their right to obtain a payment pursuant to section 38 of the *Act* as a result of the landlord's failure to abide by the provisions of that section of the *Act*. Under these circumstances and in accordance with section 38(6) of the *Act*, I dismiss the portion of the landlord's application seeking authorization to retain the deposit for this tenancy and find that the tenant is entitled to a \$3,400.00 Monetary Order, double the value of the security deposit paid for this tenancy. No interest is payable over this period.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

I am satisfied that the tenancy agreement signed by the parties includes a liquidated damage clause in the addendum allowing the landlord to recover the amount of \$1,700.00, a pre-estimated amount of the cost of re-renting the suite, if the tenant ends the tenancy earlier than the full term.

I find that the amount of the damage, the circumstances in which the amount becomes payable and the landlord's explanation of how the amount was pre-estimated to be sufficient to establish that this is a true liquidated damage clause and not a penalty clause.

I find there to be insufficient evidence to show that the landlord failed to comply with a material term of the tenancy agreement allowing the tenant to end the fixed term tenancy on a date earlier than that specified under the tenancy agreement pursuant to section 45 of the *Act*. While I accept that the tenant was unhappy with the level, frequency and extent of the noise and other side-effects accompanying the neighboring construction, based on the evidence I find that the landlord addressed these complaints in a timely and reasonable manner investigating issues and making accommodations where it was reasonable. I find the tenant's evidence including their testimony and documentary materials to be hyperbolic and more in the nature of subjective complaints. I find the tenant's version of events to generally have little evidence in support while the landlord's evidence includes written reports from third-parties who state that they did not observe issues with odours as reported by the tenant.

I do not find sufficient evidence to support the various complaints raised by the tenant. Based on the totality of the evidence I do not find the evidence demonstrates that the landlord failed to comply with the tenancy agreement allowing the tenant to end the fixed term tenancy earlier than the date specified in the agreement.

Residential Tenancy Policy Guideline 4 provides that:

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.

Accordingly, I find it unnecessary to consider the actual costs incurred by the landlord due to the early end of the tenancy agreement. I find that the clause in the tenancy agreement signed by the parties to be a valid and enforceable liquidated damage clause. I accept the evidence of the parties that the tenant ended the tenancy before the full term and as a result are obligated to pay the amount of \$1,700.00, the specified amount of the liquidated damages provided in the tenancy agreement.

Section 7 of the *Act* explains, “If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... A landlord who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.”

This issue is expanded upon in *Residential Tenancy Policy Guideline #5* which explains that, “Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.”

In the present case the parties agree that the tenants gave notice to the landlord to end the tenancy on February 29, 2020. The landlord submits that they took efforts to attempt to re-rent the unit but were unsuccessful until August 20, 2020. The evidence shows that the landlord instructed their agent to list the property on April 22, 2020, shortly after work to the unit was completed. They have provided evidence of the advertisement postings and testified as to the steps taken in finding a new occupant.

I am satisfied with the evidence of the landlord that they took reasonable steps to mitigate their losses and despite their efforts they incurred rental income losses for the months of April to mid-August, 2020. I find that the losses suffered by the landlord arise as a result of the early termination of the fixed-term tenancy by the tenant. I therefore issue a monetary award in the amount of \$15,810.00 representing the rental income loss of \$3,400.00 each month for the months of April, May, June, July and 2/3 or August, 2020.

I accept the evidence of the landlord that the rental unit required some repairs and work to be done at the end of the tenancy. I find the landlord's evidence by way of the correspondence and reports between the parties and the third-party restoration company, builder of the rental building and others to be sufficient to establish on a balance of probabilities that the damage is attributable to the tenant. I find it reasonable to conclude that continued misuse of facilities over a period of several months can lead to damages to the extent that are seen in the evidence submitted. I find the tenant's submissions disputing that they are responsible for the damage and attributing the damage to other sources to not be supported in the evidence and to have no air of reality.

I accept the landlord's evidence by way of their invoices, estimates and receipts from the various third-party companies retained to perform the repair work that the total cost incurred is \$7,424.84. Accordingly, I issue a monetary award in the landlord's favour in that amount.

As both applications were meritorious I decline to issue an order allowing either party to recover the cost of their filing fee from the other.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award issued in the landlord's favour

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$21,534.84 on the following terms:

| Item | Amount |
|---|--------------------|
| Liquidated Damage | \$1,700.00 |
| Loss of Rental Income April 1, 2020 – Aug 20, 2020 | \$15,810.00 |
| Repairs to Rental Unit | \$7,424.84 |
| Less Tenant's Award of Double Security Deposit pursuant to section 38 (\$1,700.00 x 2=\$3,400.00) | -\$3,400.00 |
| TOTAL | \$21,534.84 |

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: January 19, 2021

Residential Tenancy Branch