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, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution (the Application) that was filed by the Landlord under the Residential Tenancy Act (the Act), seeking:

- Compensation for monetary loss or other money owed;
- Recovery of the filing fee; and
- Authorization to withhold all or a part of the security deposit.

The hearing was convened by telephone conference call and was attended by an agent for the Landlord (the Agent) and the Tenant N.T. (the Tenant), both of whom provided affirmed testimony. As the Tenant acknowledged receipt of the Notice of Dispute Resolution Proceeding, including a copy of the Application and the Notice of Hearing, by themselves and the other tenant named in the Application (S.K.), and raised no concerns regarding service methods or timelines, the hearing therefore proceeded as scheduled. As the parties also acknowledged receipt of the documentary evidence before me from one another, and neither party raised concerns regarding service methods or timelines, I accepted the documentary evidence before me from both parties for consideration. The parties were provided the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing.

Although I have reviewed all evidence and testimony before me that was accepted for consideration in this matter in accordance with the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure), I refer only to the relevant and determinative facts, evidence, and issues in this decision.

At the request of the Tenant and the Agent, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses provided for them in

the Application. A copy of the decision and any orders issued in favor of the Tenants will also be mailed to S.K. at the mailing address listed for them in the Application.

Preliminary Matters

Although the Tenants took issue with a requirement in their tenancy agreement for a flea inspection at the end of their tenancy, the Landlord made no claims in relation to a flea inspection in the Application and I do not have before me a Cross-Application from the Tenants in relation to the matter of a flea inspection.

Rule 6.2 of the Rules of Procedure states that the hearing is limited to matters claimed in the Application unless the arbitrator allows a party to amend the application. As the Application before me was filed by the Landlord, I do not find it reasonable or appropriate to amend the Application to deal with the matter of a flea inspection. As a result, I have not considered the matter of a flea inspection further as part of this decision.

Issue(s) to be Decided

Is the Landlord entitled to compensation for monetary loss or other money owed?

Is the Landlord entitled to recovery of the filing fee?

Is the Landlord authorized to withhold all or a part of the security deposit, and if not, are the Tenants entitled to the return of all, some, none, or double the amount of the deposit?

Background and Evidence

The tenancy agreement in the documentary evidence before me, signed on March 30, 2018, states that the fixed term tenancy commenced on April 1, 2018, and was to continue on a month to month basis after the expiration of the fixed term on March 30, 2019. Rent was set at $1,125.00, due on the first day of each month, and a $562.00 security deposit and a $562.00 pet damage deposit were required. The tenancy agreement states that only water, the appliances listed, and free laundry were included in rent. The tenancy agreement also stated that a 2 page addendum formed part of the agreement, a copy of which was also provided for my review and consideration.

At the hearing the parties agreed that the terms of the tenancy agreement were as set out in the tenancy agreement and addendum in the documentary evidence before me, and that both the security deposit and pet damage deposit had been paid in the amount of $562.00 each. The parties were agreed that the $562.00 pet damage deposit was returned shortly after the end of the tenancy as required and that the Landlord still holds the $562.00 damage deposit in trust, less $100.00 agreed to by the Tenants in writing for a move-out fee.

The parties agreed that the tenancy ended on September 30, 2020, that condition inspections and reports were completed by both parties at the start and the end of the tenancy as required by the Act and the regulations, copies of which were also provided to the Tenants by the Landlord in compliance with the Act and the regulations, and that the Tenants provided their forwarding address in writing to the Landlord on September 30, 2020.

The Agent stated that term 19 of the addendum to the tenancy agreement states that the Tenants are to close their utility accounts on the date that they vacated the premises and that if a final bill showing a zero balance is not provided by them to the Landlord or agent during move out, the Landlord may withhold the outstanding balance from the damage deposit until satisfactory evidence from the Tenants has been received showing that the utility account has been paid in full.

The Agent stated that at the time the tenancy ended on September 30, 2020, the Tenants did not provide proof of a zero balance on all utilities, and as a result, the deposits were withheld. The Agent stated that they attempted to work with the Tenants numerous times to get this confirmation after the end of the tenancy, but as the Tenants were uncooperative and would not agree to the withholding of their deposits pursuant to term 19 of the addendum, the Application was subsequently filed on October 15, 2020, seeking retention of the Tenants' security deposit in compliance with section 38(1) of the Act, and the pet damage deposit was returned. Copies of email correspondence regarding their requests for permission to retain the deposits in compliance with term 19 of the addendum were submitted for my consideration.

The Tenant stated that at the time the tenancy ended on September 30, 2020, their final bill had not yet been issued by the utility service provider, and therefore payment of this bill or proof of a zero balance was not even possible. The Tenant agreed that they denied the Agent's requests to withhold their security deposit pursuant to term 19 of the addendum, as this term contradicts the requirements set out in section 38(1) of the Act. The Tenant stated that their final utility bill was issued on October 20, 2020, but they did

not become aware of the amount owed until October 26, 2020, after repeated calls to the municipal utility service provider on October 2nd, 8th, 9th, 13th, 15th, 20th, and 26th, and that they paid the final balance of $79.96 on October 26, 2020. A copy of the bill and proof of payment were submitted for my review and consideration. The Tenant stated that they had difficulty procuring the bill and the final bill amount as the Landlord had requested it from the municipal utility service provider, which according to the municipal utility service providers policy, overrode their own request. The Tenant also stated that despite providing proof in December of 2020, to the Agent that the final utility bill had been paid and the account closed, the Landlord neither withdrew this Application nor returned any portion of their security deposit, which they find to be unfair and significantly prejudicial to them, as it is a significant amount of money and the deposit withheld was more that three times their average utility bill amount.

Although there was no disagreement between the parties that the utility bill in question was always in the Tenant's name, the Agent stated that the Landlord's policy is to withhold the deposits at the end of the tenancy pursuant to term 19 of the addendum, which is a standard term used by the Landlord in all of their addendums, as a "safeguard" to prevent the Landlord from incurring future loss in the event that a final utility bill is not paid by a tenant and ultimately transferred to the Landlord's property taxes at the end of the year. The Agent submitted documentation from the municipality in which the rental unit is located regarding the transfer of unpaid tenant municipal utility bills to the owner's property taxes.

I confirmed with the Agent that at no time were the utility bills related to this Application in the Landlord's name and that no unpaid utility bills relating to this tenancy or Application were ever transferred to the Landlord's property taxes, a process the Agent stated occurs in the municipality in which the rental unit is located, at the end of each calendar year.

Although the Landlord withheld the Tenants' $562.50 security deposit in full as part of this Application, the total of their claim amount was only $160.00; $60.00 for outstanding utilities and $100.00 for recovery of the filing fee. When asked why the Landlord did not return the balance of the deposit to the Tenants, the Agent stated that $60.00 was only an estimate for the outstanding utility bill, as the Landlord did not have the final amount at the time the Application was filed, as it was in the Tenant's name, not the Landlord's. Further to this, the Agent stated that both the Act and term 19 of the Addendum to the tenancy agreement allows the Landlord to retain the security deposit in full, pending the outcome of the hearing. The Tenant argue that it was unreasonable for the Landlord to

have withheld the entire security deposit, as it was more than triple the amount of their average bill.

At the hearing the Agent acknowledged receiving, in December of 2020, proof that the Tenant had paid the final municipal utility bill in full. When I asked them why they had not withdrawn the Application or returned the security deposit thereafter, they stated that the Landlord still wished to recover the $100.00 filing fee for the Application at the hearing. I asked the Agent why they had not returned the remaining balance of the security deposit, less any amounts they were entitled to withhold under the Act and $100.00 for recovery of the filing fee, and they stated that the Landlord was entitled to withhold the entire amount, pending the outcome of the hearing.

Although the parties agreed earlier in the hearing that written agreement had been given by the Tenants by email and in the move-out condition inspection report, for the Landlord to retain $100.00 from the security deposit for a move-out fee, the Tenant argued that the Landlord was not entitled under the Act or the regulations to charge this fee, as the rental unit is not a strata and they were not moving between units. As a result, the Tenant argued that the Landlord should therefore not be entitled to retain this amount from the security deposit despite their written agreement. Although the Agent agreed that the move-out fee was not charged to the Landlord by a strata corporation and that the Tenants were not moving between rental units, they stated that as the Tenants agreed in writing to have this amount deducted from the security deposit, the Landlord is entitled to retain it pursuant to section 38(4)(a) of the Act. The Agent also stated that term 13 of the addendum allows the Landlord to charge this fee.

Both parties submitted documentary evidence for my review and consideration including but not limited to the tenancy agreement and addendum, a copy of the utility bill in question, proof of payment by the Tenant for the final utility bill, copies of email correspondence between the Tenants and the Agent, the move-in and move-out condition inspection report, and excerpts of documents and online publications by the Residential Tenancy Branch (the Branch) and the municipality in which the rental unit is located.

Analysis

Based on the affirmed testimony of the parties and the documentary evidence before me, I am satisfied of the following:

- that a tenancy to which the Act applies exists;
- that the tenancy ended on September 30, 2020;

- that the Tenants provided the Landlord with their forwarding address in writing on September 30, 2020; and
- that neither party extinguished their rights in relation to the security deposit.

Section 38 (1) of the Act states that except as provided in subsection (3) or (4) (a), of the Act, within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations or make an application for dispute resolution claiming against the security deposit or pet damage deposit.

Section 5 of the Act states that landlords and tenants may not avoid or contract out of the Act or the regulations and that any attempt to avoid or contract out of this Act or the regulations is of no effect.

Term 19 of the addendum to tenancy agreement states that the tenant must close their utility accounts on the date that they vacate the premises and that if a final bill showing a zero balance is not provided by the tenant to the landlord or agent during move out, the tenant agrees that the landlord may withhold the outstanding balance from the damage deposit until receipt of satisfactory evidence from the Tenant that the utility account has been paid in full.

I find that term 19 of the addendum to the tenancy agreement is an attempt by the Landlord to contract out of section 38(1) of the Act. Further to this, I find that the Agent made repeated attempts over email to have the Tenants agree to compliance with this term, despite the Tenants assertions that it contravened the Act and their requests that the Landlord comply with the Act with regards to their deposits. In accordance with section 5 of the Act, I find that term 19 if the addendum is therefore of no force or effect. Further to this, I find that term 19 of the addendum to the tenancy agreement constitutes an unconscionable term, as set out below.

Residential Tenancy Policy Guideline (Policy Guideline) #8 defines an unconscionable term under the Act, as a term of a tenancy agreement that is oppressive or grossly unfair to one party and states that terms that are unconscionable are not enforceable. Policy Guideline #8 goes on to say that a test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party and that such a term may be a clause limiting damages or granting a procedural advantage.

I find that term 19 of the addendum to the tenancy agreement is grossly unfair to the Tenants as it breaches section 38(1) of the Act and allows the Landlord to withhold their deposits without the need for compliance with section 38(1) of the Act. Further to this, I find that it is grossly unfair of the Landlord to include a term in the addendum to the tenancy agreement allowing them to withhold the Tenants' deposits at the time the tenancy ends, for utility services ended that same date and not yet been billed, and for debts not even in the Landlord's name. Finally, I find that this term of the addendum to the tenancy agreement grants a significant procedural advantage to the Landlord, by attempting to circumvent the requirements of the Act with regards to the retention of deposits, which are already held by them in trust.

Further to the above, I find the Landlord's Application before me to be both frivolous and an abuse of process as the amounts sought by the Landlord in the Application for unpaid utility bills were never owed to the Landlord, either at the time the Application was filed, or any time thereafter. In fact, the Landlord withheld the Tenants' $562.50 security deposit in accordance with a term of the addendum to the tenancy agreement which I have already found above to be both unconscionable and in contravention of the Act.

At the time of filing the Application, the utilities in question were in the Tenant's name, not the Landlord's. According to the final utility bill in the documentary evidence before me, the final utility bill relating to the Application had not even been issued until October 20, 2020. Based on the affirmed testimony of both parties and the proof of payment submitted by the Tenants, I am satisfied that the Tenants paid the bill in full, on October 26, 2020, which is well before the bill due date of November 10, 2020 and therefore no amounts relating to utilities were ever owed to the Landlord in relation to this tenancy or outstanding in the Tenant's name after the end of the tenancy and the due date for the final utility bill. Further to this, I am satisfied by the testimony of the parties at the hearing, including the Agent, that even upon receipt of proof from the Tenants in December 2020 that all outstanding utility bills relating to the tenancy had been paid, which I have already stated above were in the Tenant's name at all material times, not the Landlord's, the Landlord did not withdraw this Application or return any portion of the Tenants' security deposit.

Policy Guideline #17, section C(3) states that unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has filed a claim against the deposit that is found to be frivolous or an abuse of the dispute resolution process. I have already found above that the Landlord's Application seeking

retention of the Tenants' security deposit was both frivolous and an abuse of process. As the Tenants have not filed an Application for Dispute Resolution seeking the return of their deposit and did not waive the doubling requirement at the hearing, I therefore find that they are entitled to double the amount of their security deposit, less any amounts they were entitled to withhold under section 38(4) of the Act, pursuant to section 38(6) of the Act and Policy Guideline #17. No interest is payable.

Section 38(4) of the Act states that a landlord may retain an amount from a security deposit or a pet damage deposit if, at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant. While parties agreed that the Tenants had authorized the Landlord in writing to retain $100.00 from the security deposit for a move-out fee, I do not find that the Landlord was entitled under the Act or the regulations to charge this fee. Although section 7 of the regulations allows Landlords to charge certain non-refundable fees, including moving fees, moving fees are restricted to fees charged for moving between rental units within the residential property, if the tenant requested the move, and a move-in or move-out fee charged by a strata corporation to a landlord. In addition to this, section 7(2) of the regulations states that a landlord must not charge the above noted fees unless the tenancy agreement provides for that fee.

Although term 13 of the addendum states that the Tenants agree to pay the Landlord $100.00 upon move-out for associated costs, as the Tenants were not moving between rental units and the $100.00 moving fee was not charged by a strata corporation to the Landlord, I find that the Landlord had no right to charge the $100.00 move out fee. As a result, I find that the term in the addendum requiring the move-out fee is another attempt by the Landlord to contract out of the Act and regulations and is therefore unenforceable pursuant to section 5 of the Act.

As I have found above that the Landlord was not entitled to charge the move out fee, I find that it was therefore neither a liability for which the Tenants are responsible or an obligation by the Tenants to the Landlord under the Act. As a result, I find that the Landlord was not entitled to retain this amount under section 38(4) of the Act, despite the Tenants having agreed to it in writing.

As recovery of the filing fee for the Application would not be required if this Application, which I have already found is both frivolous and an abuse of process on the part of the Landlord, had not been filed, I therefore decline to grant the Landlord recovery of the $100.00 filing fee.

Based on the above, and pursuant to section 67 of the Act, I therefore grant the Tenants a Monetary Order in the amount of $1,125.00, double the amount of the $562.50 security deposit.

Conclusion

The Landlord's Application is dismissed in its entirety without leave to reapply.

Pursuant to section 67 of the Act, I grant the Tenants a Monetary Order in the amount of $1,125.00. The Tenants provided with this Order in the above terms and the Landlord must be served with this Order as soon as possible. Should the Landlord 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.

Although I believe that this decision has been rendered in compliance with the timelines set forth in section 77(1)(d) of the Act and section 25 of the Interpretation Act, in the event that this is not the case, I note that section 77(2) of the Act states that the director does not lose authority in a dispute resolution proceeding, nor is the validity of a decision affected, if a decision is given after the 30 day period in subsection (1)(d).

Because I am concerned that the landlord has contravened the requirements of the Act in a particularly egregious manner, and I am concerned, based on the testimony of the Agent at the hearing, that the contraventions, including unenforceable and unconscionable terms, are part of standard tenancy agreements and addendums routinely used by the Landlord, that they have potentially contravened the requirements of the Act repeatedly in relation to a large number of tenants, I am sending a copy of this decision to my manager. My manager will review this decision and if they are of the opinion that these circumstances could reasonably lead to administrative penalties, then they will send a copy of this decision along with any other relevant materials, including but not limited to this dispute resolution file and/or the dispute resolution files in which the Landlord has been a party, to the Compliance and Enforcement Unit.

This separate unit of the Branch is responsible for administrative penalties that may be levied under the Act. They have the sole authority to determine whether to proceed with a further investigation into this matter and the sole authority to determine whether administrative penalties are warranted in these circumstances. After any dispute resolution materials are sent, neither I nor my manager play any role in their process and, if the Compliance and Enforcement Unit decides to pursue this matter, they do not provide me or my manager with any information they may obtain during their process.

Before any administrative penalties are imposed, a person will be given an opportunity to be heard. While the Compliance and Enforcement Unit can review the contents of this dispute resolution file and/or the dispute resolution files in which the Landlord has been a party, they can also consider additional evidence that was not before me or other arbitrators. They are not bound by the findings of fact I or other arbitrators have made in decisions rendered on authority delegated to them by the Director of the Branch under Section 9.1(1) of the Act.

Any further communications regarding an investigation or administrative penalties will come directly from the Compliance and Enforcement Unit.

This decision is made on authority delegated to me by the Director of the Branch under Section 9.1(1) of the Act.

Dated: March 11, 2021

Residential Tenancy Branch