Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Royal LePage Northstar Realty
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, MNDCT, FFT

Introduction

The former tenants (hereinafter, the "tenant") filed an Application for Dispute Resolution (the "Application") on May 25, 2021. They seek the return of the security deposit they paid at the start of the past tenancy. They also seek other monetary compensation, and reimbursement of the Application filing fee.

The matter proceeded by way of a hearing pursuant to s. 74(2) of the *Residential Tenancy Act* (the "*Act*") on November 23, 2021. Both the tenant and the landlord attended the hearing. In the conference call hearing I explained the process and offered the parties the opportunity to ask questions.

At the start of the hearing, each party confirmed their receipt of the evidence prepared by the other. On this basis, I proceeded with the hearing, with each party making oral submissions and presenting their evidence.

Issues to be Decided

Is the tenant entitled to a return of the security deposit, pursuant to s. 38 of the *Act*?

Is the tenant entitled to other monetary compensation associated with the tenancy, pursuant to s. 67 of the *Act*?

Is the tenant entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

The landlord submitted a copy of the tenancy agreement. Both parties signed this agreement digitally on June 29, 2020 for the tenancy starting on July 1, 2020. The tenancy was for a fixed term, to end on June 30, 2021. The monthly rent was $2,500 payable on the 1st of each month. The tenant paid a security deposit of $1,250 and a pet damage deposit of $1000.

There is an addendum to the tenancy agreement, signed by the tenant on June 29, 2020. Clause 9 of that piece reads as follows:

> In the event that you, the tenant, do not remain at the property for the full term of this lease agreement, you will be charged $400.00 dollars plus one months rent and any advertising costs as liquidated damages. [The landlord] will attempt to approve and secure a new tenant for the property. Once a new tenant has taken possession of the rental property, you will no longer be liable under your fixed term lease agreement from that date forward.

The tenancy ended when the tenant advised the landlord of their intention to move out from the rental unit on January 13, 2021 via email: “We are planning to move out by end of Feb 2021.” The tenant followed with a formal written notice on January 15th, stating: “I will be vacating the unit on Feb.28th 2021.”

Following this, the landlord advised the tenant they would be responsible for monthly rent until the end of the fixed term “until July 01 2021.” Further: “We can work with you in a effort to replace you but if we are not successful you will be responsible for the fix term lease until a new tenant is secured or the end of the fixed term.”

The landlord submitted a copy of the Condition Inspection Report. This documents the final move-out inspection meeting that the parties attended on February 28, 2021. The tenant provided their name in the provided space and indicated they “agree that this report fairly represents the condition of the rental unit.” The tenant signed to indicate they agreed to a $1,250 deduction from the security deposit.

The landlord presented that they had to advertise and show the rental unit to prospective new tenants throughout February. This was in order to have new tenants for the month following. The amount indicated on the report is one-half-month’s rent for those costs. They confirmed this with the tenant at the final meeting. In the hearing, the tenant provided that there was no other communication about this and no mention of the addendum. The landlord just stressed the need for cleaning and showings. The tenant submits they do not understand why the landlord kept $1,250.

The landlord later returned the balance of the pet damage deposit to the tenant. This was by cheque on March 10, 2021. The amount was $937.50. This accounts for a deduction of $62.50 from the $1,000 pet damage deposit. This was the amount of G.S.T. on the $1,250 the landlord kept.

Aside from this, the tenant claims $147 from the landlord. They presented there was an agreement at the start of the tenancy for carpet cleaning and sanitizing that was not completed by the previous tenant. They arranged for this, with the agreement from the landlord they would be reimbursed for this. There was no reimbursement. The tenant submitted the invoice for the service date of June 30, 2020.

The tenant also paid $80 at the end of the tenancy for cleaning; however, they did not submit evidence of this in the form of a receipt.

In the hearing the landlord reiterated they were not claiming or taking issue with anything about cleanliness or damage to the rental unit. Even though they incurred some costs for this after the tenant left, they are not claiming any amount of the security deposit for this. The tenant re-stated their point that their focus was the tenancy agreement, and not the addendum, meaning they signed off on the security deposit for cleanliness or unit repair, and not for the purposes of liquidated damages because of the early end to the tenancy.

Analysis

The tenant claimed for the return of the security deposit. The piece of the *Act* that governs use and return of the security deposit is s. 38.

The *Act* s. 38(1) provides that a landlord must either: repay a security and/or pet deposit; or apply for dispute resolution to make a claim against those deposits. This must occur within 15 days after the later of the end of tenancy or the tenant giving a forwarding address.

Following this, s. 38(4) provides that a landlord may retain a security deposit or pet deposit if the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant. This subsection specifies this written agreement must occur at the end of a tenancy.

Then, s. 38(6) sets out the consequences where the landlord does not comply with the requirements of s. 38(1). These are: the landlord may not make a claim against the deposit; and the landlord must pay double the amount of the deposit.

The landlord retained $1,250 from the tenant. This is the entirety of the security deposit amount. In theory, the parties may agree to the landlord retaining the security deposit, for payment of a tenant's liability or obligation, in this manner. The way it appears the parties completed this here – at the final inspection meeting and signed off on the Condition Inspection Report – is allowed under the *Act* s. 38(4). This was with the tenant's signature.

The tenant here questioned the use of the security deposit for the reason given by the landlord. I find their submission is that the purpose of foregoing the security deposit was not clear to them. To be sure: the condition of the rental unit at the end of the tenancy and any need for cleaning is not at issue. This leaves my consideration of the landlord's use of the security deposit for the purposes of liquidated damages, and whether that is truly a liability or obligation of the tenant.

In the hearing, the landlord testified they showed the rental unit to new tenants and advertised the rental unit. There were no further details on the number of showings or other administrative costs borne by the landlord to have the unit re-rented for March 2021. I find there is no evidence to show what the amount of $1,250 truly represents. The fact that it is the total security deposit amount makes it appear arbitrary. Even it is a rough approximation (and it was *not* stated thus in the hearing), it is out of balance with what the addendum set as liquidated damages amount. Details on why the one-half rent amount (i.e., the security deposit) is the amount for this purpose are not in the evidence and the landlord did not provide this information in the hearing.

Without a written account or agreement with the tenant on the disbursement of the security deposit amount, I find it more likely than not the tenant did not understand the reason they agreed to this. That is based on the amount involved, and because it is filled in on the Condition Inspection Report. It is not clear as to its true purpose, whether it is tied to the condition of the rental unit. A different liability, reflective of the addendum item, should more properly be recorded in a different fashion. It is not implausible that it could be documented differently.

I find the purpose of the $1,250, though not clear to the tenant at the time, is for coverage of the liquidated damages clause. I also consider the essence of that clause, and the nature of its purpose.

The Residential Tenancy Branch has a set of *Residential Tenancy Policy Guidelines*, in place to provide statements on the policy intent of the *Act*. On Liquidated Damages, Policy Guideline 4 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."

I find a framework for the clause is not in place. In the addendum, it is $400, along with a one-month rent amount. I find these amounts are arbitrary, and do not reflect true costs associated with re-renting the unit. These are penalties, and thus not enforceable.

There is a single other piece mentioned in the addendum, that of more variable advertising costs. It is not clear from the evidence if the landlord settled for the $1,250 amount as compensation for this. The categorization thus stated *does* give something that would more fairly approximate the cost of doing business for the landlord; however, I find this was not the rationale in place for the landlord here when fixing the security deposit amount as costs for re-renting.

The costs of each of advertising, interviewing, administration and re-renting are not established. I find it more likely than not these costs would not, in any event, approach $400 plus the one-month rent amount, here totalling $2,900. I find the clause is invalid in that it is punitive in nature. I find the landlord did not establish the true value of a loss involving re-renting the unit, and this arbitrary amount is in essence not enforceable.

The landlord withholding the security deposit is likewise not enforceable. Even though it is a substantial reduction in the amount set out in the addendum, in essence it is a penalty. I find the amount is not a liability or obligation of the tenant because it is applied against a penalty clause; therefore, I order the landlord to return the $1,250 amount to the tenant.

The reason the landlord did not apply against the security deposit, as per s. 38(1) was the tenant's signature on the Condition Inspection Report. I find the landlord shall return the entirety of the security deposit amount to the tenant; however, I do not concede to an award of double the deposit amount. I find there was no violation of s. 38(1) by the landlord when they had the tenant's signature in place.

As above, the landlord did not show the expenses they incurred for re-renting the unit. I can't deem the GST to be a loss to the landlord they should rightfully recoup. That is not documented to the tenant here. They are not providing a service to the tenant; therefore, they cannot pass this charge on to the tenant.

Alternatively, s. 38(7) specifies that any amount retained from the pet deposit "may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise." There is no evidence the tenant conceded to this charge being

deducted from the pet deposit. For this reason, I order the $62.50 returned to the tenant.

I find the tenant has proved they paid an initial cleaning charge of $147 when the tenancy started. I order payment of this amount from the landlord to the tenant. With no proof of payment, there is no return of the final cleaning amount paid by the tenant.

The *Act* s. 72 grants me the authority to order the repayment of a fee for the Application. As the tenant was successful in their claim, I find they are entitled to recover the $100 filing fee from the landlord.

Conclusion

I order the landlord to pay the tenant the amount of $1,559.50 as set out above. I grant the tenant a monetary order for this amount. They must serve this order on the landlord. Should the landlord fail to comply with this monetary order, the tenant may file it in the Provincial Court (Small Claims), where it may be 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 s. 9.1(1) of the *Act*.

Dated: November 29, 2021

Residential Tenancy Branch