Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Westwynd Real Estate Services Ltd. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for a monetary order for unpaid rent of $1,850.00; a monetary order of $971.25 for damage or compensation for damage under the Act, retaining the security deposit for these claims; and to recover the $100.00 cost of their Application filing fee.

The Tenants, T.A. and A.T., and an agent for the Landlord, J.B. ("Agent"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about it. During the hearing the Tenant and the Agent were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Landlord provided the Parties' email addresses in the Application, and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

At the outset of the hearing, I advised the Parties that pursuant to Rule 7.4, I would only consider their written or documentary evidence to which they pointed or directed me in the hearing. I also advised the Parties that they are not allowed to record the hearing and that anyone who was recording it was required to stop immediately.

Issue(s) to be Decided

- Is the Landlord entitled to a monetary order, and if so, in what amount?
- Is the Landlord entitled to recovery of the Application filing fee?

Background and Evidence

The Parties agreed that they signed a fixed term tenancy agreement setting out that the tenancy would begin on July 1, 2021, and run to June 30, 2022, and then operate on a month-to-month basis. The tenancy agreement states that the Tenants are required to pay the Landlord a monthly rent of $1,850.00, due on the first day of each month, and to pay the Landlord a security deposit of $925.00, and no pet damage deposit.

However, the Tenants changed their minds and never moved in to the rental unit. The Landlord seeks compensation for what he asserts is a breach of the tenancy agreement.

#1 MONETARY ORDER FOR UNPAID RENT → $1,850.00

I asked the Agent why I should award the Landlord with the compensation sought, and he said:

> The $1,850.00 is rent for the month of July 2021, because we had a binding lease agreement and they broke it, so we were not able to collect rent for July 2021. We secured a tenant for August 1, so we're not seeking compensation beyond the month of July.

The Tenants said that they submitted their response, writing down why they decided not to move in. In the hearing, they said:

> Primarily, because it was completely unsanitary, unhygienic, and unsafe, which we discovered after the move-in inspection. [The Agent] didn't assure us to the extent that they would repair the suite. I was eight months pregnant at the time.

The Tenants said that they emailed the Agent to tell him about the condition of the rental unit. They said they uploaded photographs, although, they said that the Agent did not include these emails in his submissions of the Parties' communications.

The Tenants said they had a move-in inspection, but they did not discover the problems with the unit during that inspection. The Tenant said:

> It was performed by [V.] – five minutes. He said he took pictures of the suite and that he would email the [condition inspection] report to us and we could add on anything. We let them know within three days. When [V.] left, that's when we went through the suite. Unhygienic.

The other Tenant said:

> On top of it, the move-in inspection was scheduled at 12:30 [p.m.], but he showed up at 1:15 [p.m.]. He called us to say he was running late, but he asked us to park our car in a no-loading zone. He said 'It will be quickly done'.
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> As soon as [V.] entered the suite, he was taking pictures, he left the keys on the shelf and said the move-in inspection was done. We were given three days, if we found anything else. There was no power during the move-in inspection. We had to activate hydro the next day and do our inspection
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> Nothing was pen and paper with the inspection - nothing to write on. No input from us. Everything in the report is written as 'satisfactory'. See page 5 of the condition inspection report [("CIR")], and see that the ceiling fan is coming off in the bathroom. He didn't say anything about it. Where there is no power, and the ceiling fan is coming off, but he wrote it satisfactory. This made us suspicious. He left within a maximum of 10 minutes. This is how we discovered that this unit is not livable.
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> Most of all important. That place is not livable. We shared our pictures. This is not included in his move-in inspection report.
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> Before the inspection, we had to sign everything off. In one of our conversations, we asked if we could do the move-in inspection before we gave the money on June 14th, when the suite was empty. We were not saying that we were moving in early. We didn't have much to do after getting in, even when we responded what we found from our inspection that we did ourselves.

During his moving inspection, he couldn't even show us where to park our car or the mail. There was no power, so we had to bring it with BC Hydro. Yes, we signed the agreement but it was their process of signing up. In the same day we did sign up through an online application for paying the rent. Our inspection wasn't until June 25th.

The Agent said:

We showed the property to Mr. [T.] - my calendar says June 2. I was doing showings. on or around that time. At that time, the property was vacant. The previous tenant had been there for several years. We had a completely empty property without any furnishings or anything to obscure the floors or walls. There was no time pressure on the showing. He was the last showing of the day. We had a very detailed walk-through. We spoke about the property and the condition of the suite. It's an older property and the carpets and appliances are older. It is serviceable and we did have the carpets cleaned before they moved in.

They submitted an application to rent the property dated June 12. Based on the application that was submitted - we received several applications - we felt these applicants were the most suitable. They signed a lease agreement on June 14. It was then taken off the market. We had the carpets professionally cleaned on June 21; they cleaned the carpets, as well as the bathroom floors and showers. We are not asking for these costs.

That's when the lease was signed. The Tenants demanded that we let them in early, I explained that the lease starts July 1, but we could get them in early and we waived the pro-rated rent for June. They met with [V.] on June 25 and did the walk-through. It should be noted that we do have a disclaimer on our check-in reports that if the tenant notices anything within the next three days to let us know. We are not trying to put one past anybody. We don't want to do a check-in and the tenants find something wrong three days later…. It is correct that we extend that to our tenants that they can email it to us after the fact and we'll add it to the file .

The reason why I included the check in report is to show that the Tenant did walk though the property and was afforded the opportunity to walk through the property. It was definitely done in person, which is why we included the CIR. They were quite excited by the opportunity to secure a very large two-bedroom apartment in [the City]. I believe they changed their mind.

The Tenant said:

> What he is saying regarding how he showed my husband the suite, he had sent us that email – page two of the missing emails… you can see that my husband responded. How he showed my husband the suite is completely false. My husband stated one by one what happened. The showing was June 12th for 15 minutes, and [the Agent] said there's a showing after you. He was rushing my husband. My husband said that [the Agent] went to the lobby of the building for the next showing.
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> In the email as well, he claimed that my husband took his phone out to take pictures for me, which is completely false.
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> Re the appliances, Jeff said they were old, but for $1,850.00, what he said and it is on page two is that they are old and they're functioning, and they will replace them if they are not working. At no point did we not move in because of the broken appliances.
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> Several things are completely wrong. There was black mould in the washroom ceiling. In addition, in the second bathroom – the *en suite* – there was an electrical fire hazard. There was a rotten and mouldy cabinet in second bathroom. The oven and fridge were not cleaned at all - completely greasy.
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> We completely lost faith in [the Landlord]. They were trying to commit fraud – that's why we didn't move in. If it was empty in May, these things should have been fixed. The electrical hazard, the mould, we mentioned this, and he didn't include any emails after June 25.

The Agent said:

> The fact that an application was made after the showing shows that he had ample opportunity it visit the property. They were comfortable enough to submit an application, and comfortable enough to sign an agreement, and to give the security deposit. He never said he felt rushed or didn't have enough time to see it. They should have been aware by the time they signed the tenancy agreement. I did do showings on the 2nd. We could amend my previous statement that I showed him on the 12th not the second. I'm not in the mind frame of pushing people into signing tenancy agreements that's not what we do.

The Tenant said:

> He said he wasn't rushing us at all, but in his emails: 'I have back up offers. If I don't get a signed lease from you today – next 30 minutes….' It is incorrect that we had enough time – he was pushing us.

The Tenants submitted copies of email communications between the Parties. One email was dated June 27, 2021, at 10:35 p.m. and is entitled: "Disputing Condition Report June 25 2021 and Not Interested in Tenancy from July 1 2021". In this email, the Tenants set out their findings on inspecting the rental unit in the three days after the move-in condition inspection with [V.] on June 25, 2021. This email included the following comments from the Tenants:

> We are incredibly disappointed that you [Agent], knowing my wife is pregnant and a healthcare worker, rented us the suite when there is obvious mold, fire hazard, unhygienic, and completely unclean, especially during this time with COVID-19. We are appalled that this suite was not cleaned top to bottom as it has been empty since at least June 12 when I quickly viewed the suite and is in need of so much repair and maintenance.
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> After full consideration, I cannot move in to suite 705 knowing that my wife and expecting baby would have to endure the suite is in this condition. Therefore, we will not be moving in July 1, 2021 and we are notifying you to return the damage deposit in the amount of $925 CAD. Furthermore, any attempts from [the Landlord] to withdraw funds from our bank will be recognized as fraudulent transactions without our consent. YOU OR [THE LANDLORD] DO NOT HAVE OUR CONSENT TO WITHDRAW ANY AMOUNT OF MONEY FROM OUR BANK ACCOUNT.
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> We can work out a mutual time for you to get the keys (note that we were given 0 mailbox keys and only have one set of parking keys).

#2 DAMAGE OR COMPENSATION FOR DAMAGE → $971.25

I asked the Agent to explain the Landlord's second claim, and he said:

> This is the cost to re-lease the property that the owner incurred when the property was leased to the Tenants. She then had to pay this again when the property was leased to the new tenants.

> Page one of the lease sets out the liquidated damages for a breach of the contract. This is equivalent to two months' rent. We were not looking for this amount, just the security deposit plus GST.

I asked the Agent why they would charge GST, and he said: "The leasing fee is chargeable to the owner of the property, so it is included in the claim."

The Tenants said:

> We believe that we incurred far greater losses, and deserve the security deposit back to us. We had every intention of moving into the suite, prior to the moving inspection. We had monetary losses, BC Hydro cancellation – the new suite had no electricity - so we had to move our electricity and pay cancellation fees to the movers. As well, [V.] delayed our appointment – we suffered unpaid time off from work.

I asked the Agent if they had contacted other applicants for the rental unit. He said:

> We went through that list right away, but they had already found places. We didn't find out this until five days prior to the end of the month. All the applicants and most people in the market had secured a place by July 1st.
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> The only thing to add is that they could have requested specific remedies if they wanted specific things done. We won't have replaced the carpets or painted the walls, and we could have cleaned it – time to do that. However, that request wasn't made. We've been quite reasonable in our request. We did a good job mitigating the loss and finding someone for August 1st at the same rent.

The Tenants said:

> Just in response to what he just said. We did provide an email – on page three of that file - we outlined what was wrong with the apartment. He responded saying they are a moot point. He had the opportunity to change it. I was eight months pregnant; I didn't want to move my baby into a place with mould and an electrical hazard.

The Landlord submitted a document labelled: "[address]_Invoice_for_Leasing", which indicates the rental unit address with a charge of $925.00 plus GST for a total of $971.25 for "[Landlord] Realty Labour".

Analysis

Based on the documentary evidence and the testimony provided during the hearing, and on a balance of probabilities, I find the following.

Before the Parties testified, I advised them of how I would analyze the evidence presented to me. I said that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Landlord must prove:

1. That the Tenants violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Landlord to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Landlord did what was reasonable to minimize the damage or loss.

("Test")

Termination of the Fixed Term Tenancy

Pursuant to section 16 of the Act, the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit. The Tenants were bound by their signatures on the tenancy agreement.

Section 7(1) of the Act states that if a landlord or a tenant does not comply with the Act, regulation or tenancy agreement, the non-compliant party must compensate the other for the damage or loss that results. Section 67 of the Act authorizes me to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

Section 45 of the Act sets out a tenant's obligations regarding giving notice to end a tenancy. Section 45(2) of the Act deals with ending a fixed term tenancy, as follows:

> **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.

In this case, the undisputed evidence is that the Tenants breached the fixed term tenancy agreement by providing notice of the end the tenancy on June 27, 2021, in an email to the Agent. This was for a tenancy that was to start on July 01, 2021.

However, under the Act, the Tenants were not entitled to give notice to end the tenancy prior to the date specified in the tenancy agreement, which was June 30, 2022. I find the Tenant breached section 45 (2) of the Act, as the earliest date they could have legally ended the tenancy was on June 30, 2022.

I find that the Landlord did what they could to mitigate the loss they incurred from the early end to the fixed term tenancy. The Landlord found new Tenants for August 1, 2021, for the same rent as the Tenants had agreed to pay. Given the very short notice of the end of the tenancy, I find it would be unreasonable to expect the Landlord to find new tenants for July 1, 2021.

The Tenants argued that they were not given sufficient opportunity to view the rental unit, and that they expected it to be in prime condition from the start of the tenancy. Further, they say they were hurried into signing the tenancy agreement, before they had a chance to do a proper move-in inspection. However, given the tight rental market, across the Province, let alone in this City, I find it odd that the Tenants were surprised by what occurred in this situation.

Further, I note that there is little evidence before me that the Tenants asked for the deficiencies in the rental unit to be repaired. They did not give the Landlord an option to bring it up to the standards required by the Tenants, despite the Tenants having had access to the rental unit five days prior to the tenancy started. I find that the Landlord could have repaired/cleaned the deficiencies in this time, if asked.

#1 MONETARY ORDER FOR UNPAID RENT → $1,850.00

RTB Policy Guideline #3 states that damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule, this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. Therefore, I find that

the landlord is entitled to the one month of rental income they lost for the fixed term of the tenancy agreement. In this case, I award the Landlords with **$1,850.00** representing rent lost in July 2021, pursuant to sections 45 and 67 of the Act.

#2 DAMAGE OR COMPENSATION FOR DAMAGE → $971.25

The Tenants argued that they suffered "far greater losses" than did the Landlord in this situation; however, the Landlord did not break the lease, the Tenants did. Further, the Tenants signed a tenancy agreement with a clause for "liquidated damages". A tenant cannot avoid such a clause, unless an arbitrator finds it unreasonable.

Policy Guideline #4 ("PG #4"), "Liquidated Damages", is a guideline for situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages. PG #4 states:

> 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. 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.

I find that the Landlord has not provided sufficient evidence that re-leasing the rental unit for August 1, 2021, cost the same amount as the security deposit to the penny, plus GST. There are no receipts for the cost of re-advertising the rental unit, including an hourly rate and the amount of time it took for re-renting the rental unit.

While the Landlord has not claimed the full amount set out in the liquidated damages clause for this claim, I find that this reduction is not sufficient mitigation of the claim in these circumstances. Without any itemized account of the efforts the Landlord incurred in re-leasing the property, I find that this claim amounts to a penalty clause, rather than re-leasing costs. As a result, I dismiss this claim without leave to reapply, pursuant to section 62 of the Act.

Summary and Set Off

I find that this claim meets the criteria under section 72 (2) (b) of the Act to be offset against the Tenant's security deposit of $925.00 in partial satisfaction of the Landlord's monetary award. I authorize the Landlord to retain **$925.00** of the Tenant's security deposit in partial satisfaction of the Landlord's monetary award.

Given the Landlord's partial success in this matter, I award the Landlord with recovery of half of the Application filing fee from the Tenants or **$50.00**, pursuant to section 72.

Pursuant to section 67 of the Act, I grant the Landlord a Monetary Order of **$975.00** from the Tenants for the remainder of the monetary award owing to the Landlord by the Tenants.

Conclusion

The Landlord is partially successful in their Application, as they provided sufficient evidence to establish a claim for one month's rent that was lost when the Tenants ended a fixed term tenancy before it had begun. The Landlord is awarded $1,850.00 from the Tenants in this regard. The Landlord is also granted recovery of half of the $100.00 Application filing fee for a total monetary award of **$1,900.00** from the Tenants.

The Landlord is authorized to retain the Tenants' $925.00 security deposit in partial satisfaction of this award. The Landlord is granted a monetary order of **$975.00** for the remainder of the monetary awards owing to the Landlord.

This Order must be served on the Tenants by the Landlord and may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

This Decision is final and binding on the Parties, unless otherwise provided under the Act, and 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: March 07, 2022

Residential Tenancy Branch