Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 1161611 B.B. Ltd. doing business as REAL PROPERTY MANAGEMENT EXECUTIVES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNRL, FFL

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord under the *Residential Tenancy Act* (the *Act*) on November 17, 2021, seeking:

- Compensation for monetary loss or other money owed;
- Recovery of unpaid rent;
- Authorization to withhold the Tenants' security and/or pet damage deposit(s); and
- Recovery of the filing fee.

The hearing was convened by telephone conference call on June 17, 2022, at 1:30 P.M. (Pacific Time), and was attended by an agent for the Landlord S.P. (the Agent), the Tenants, and the Tenants' legal counsel A.S., all of whom provided affirmed testimony. The Tenants acknowledged receipt of the Notice of Dispute Resolution Proceeding (NODRP) from the Landlord by registered mail and raised no concerns with regards to the service method or date. I therefore proceeded with the hearing as scheduled.

The Agent stated that the Landlord's documentary evidence was served in the same registered mail packages as the NODRP, and the Tenants acknowledged receipt. The Agent also acknowledged receipt of the Tenants' documentary evidence. As none of the parties raised concerns with regards to service of the documentary evidence before me, I have therefore accepted it 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. The parties were advised that pursuant to rule 6.10 of the Rules of Procedure, interruptions and inappropriate behavior would not be permitted and could result in limitations on

participation, such as being muted, or exclusion from the proceedings. The parties were asked to refrain from speaking over one another and to hold their questions and responses until it was their opportunity to speak. The Parties were also advised that pursuant to rule 6.11 of the Rules of Procedure, recordings of the proceedings are prohibited, except as allowable under rule 6.12, and the parties confirmed that they were not recording the proceedings.

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

At the request of the parties, copies of the decision and any orders issued in their favor will be emailed to them at the email addresses listed in the Application and confirmed at the hearing.

Preliminary Matters

Preliminary Matter #1

At the outset of the hearing, I asked if the name listed for the Landlord in the Application was the full and correct name for the legal entity know in this decision as the Landlord. The Agent stated that it was not, as the Landlord is a private limited company doing business as a named entity. The Agent provided me with the full legal name for the private limited company, and the Application was amended accordingly to reflect the name of the private limited company doing business as the entity originally named as the Landlord in the Application.

Preliminary Matter #2

The Agent stated that earlier on the date of the hearing, June 17, 2022, they had emailed the Tenants/Tenants' lawyer documentation relating to a missed rent payment in December of 2021, and an NSF fee. The Agent stated that they therefore wished to amend the Application at the hearing to include the additional $2,125.00 sought for December 2021 rent and the NSF fee. The Tenants' lawyer argued that it was unreasonable to make the requested amendments at the hearing as they had not even noticed the email prior to the hearing.

Although rule 4.2 of the Residential Tenancy Branch Rules of Procedure (the Rules of Procedure) allows parties to amend applications at the hearing in circumstances that can reasonably be anticipated, I do not find that the amendments now sought at the hearing by the Agent meet this criterion. If the Landlord and their agents were unaware until earlier on the date of the hearing that the amount sought in the Application for outstanding rent and fees was incorrect, as an outstanding payment and NSF fee for December of 2021 were unaccounted for, I do not find it reasonable to conclude that either the Tenants or their lawyer would have reasonably been able to anticipate such an amendment request at the hearing. As a result, I denied the Agent's request to amend the Application at the hearing to include outstanding rent and an NSF payment for December of 2021.

Issue(s) to be Decided

Is the Landlord entitled to compensation for monetary loss or other money owed in the amount of $1,100.00?

Is the Landlord entitled to recovery of $2,100.00 in rent for November of 2021?

Is the Landlord authorized to withhold the Tenants' security and/or pet damage deposit(s)? If not, are the Tenants entitled to their return or double their amount?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The tenancy agreement in the documentary evidence before me states that the fixed term tenancy commenced on May 10, 2021, and was set to end on May 31, 2022, after which time the tenancy could continue on a periodic (month-to-month) basis. The tenancy agreement states that rent in the amount of $2,100.00 is due on the first day of each month, that a $25.00 late fee will apply each month that rent is not paid on time, and that a $1,050.00 security deposit is required. At the hearing the parties agreed that the security deposit was paid and is still held in trust by the Landlord. The tenancy agreement also contains a clause titled "LIQUIDATED DAMAGES" in the amount of one half month's rent under section 4.16.

The parties agreed that the tenancy ended on October 27, 2021, and that a forwarding address was provided by the Tenants to the Landlord in writing by email on November

7, 2021. The parties agreed that move-in and move-out condition inspections were completed as required, and although the Tenants acknowledged receipt of the move-out condition inspection from the Landlord as required, they stated that they were never provided with a copy of the move-in condition inspection report. The Agent stated that at the end of the move-in condition inspection, the report was completed, and the Tenants took a picture of the report. As a result, the Agent argued that the Tenants were provided with a copy via photograph at the time of the move-in condition inspection.

The parties agreed that the Tenants advised the Landlord on September 1, 2021, via email that they needed to end the tenancy and that they were advised to provide proper written notice. The parties agreed that a formal written notice was received by the Landlord on September 2, 2021, stating that the Tenants would be ending the tenancy effective October 31, 2021. A copy of the above noted emails and formal notice were provided for my review and consideration.

The Agent stated that as the date given for ending the tenancy, October 31, 2021, was prior to the end date for the fixed term of the tenancy agreement, May 31, 2021, they advised the Tenants of the legal and financial ramifications of breaking their lease early. Nevertheless, the Agent stated that the Tenants failed to pay rent for November of 2021 in the amount of $2,100,00 and that a late fee of $25.00 and an NSF fee of $25.00 were also charged as a result. The Tenants' lawyer argued that as the Landlord was aware as early as September 1, 2021, that the tenancy would be ending on October 31, 2021, the Landlord should not have attempted to continue withdrawing rent after October 31, 2021. As a result, the Tenants and their lawyer argued that the Tenants should not be responsible for any NSF or late fees after October 31, 2021.

The parties disputed whether the Landlord acted reasonably to have the rental unit re-rented expediently at a reasonably economic rate, and therefore whether the Tenants were responsible for any loss of rent after the date the tenancy ended. The Tenants and their lawyer argued that the Tenants had made all reasonable attempts to get the rental unit re-rented expediently, including sharing the Landlord's posting online through social media and requesting authorization to either sublet the rental unit or assign the tenancy, both of which were unreasonably denied by the Landlord. Although the Agent agreed that the Tenants had promoted the property for re-rental, they argued that the Tenants did not have the Landlord's authorization to do so. They also agreed that authorization to sublet the rental unit or assign the tenancy was not given. The Agent stated that the rental unit was advertised for re-rental expediently on September 3, 2021, at the same rental rate as the Tenants' rent under the tenancy agreement ($2,100.00), and was

reduced to $1,950.00 on December 15, 2021, as they had no yet found new tenants. The Agent stated that the majority of applicants were unsuitable for various reasons, such as credit score or income, and that the rental unit was therefore not re-rented until January 7, 2022. The Agent stated that the Landlord is losing $750.00 per month in rent under the new tenancy agreement as it was only re-rented at the reduced rate of $1,950.00, but that the Landlord is not seeking any additional lost rent between January 2022 and the end of the fixed term, May 31, 2022.

The Tenants' lawyer argued that no proof of rental listings or reductions was submitted for my review and consideration by the Landlord and therefore the Landlord failed to meet the burden of proof incumbent upon them regarding mitigation. They also stated that the Landlord has failed to explain why several applicants whom the Tenants know applied and were well qualified with sufficient income and willing to pay the $2,100.00 original rental rate, were not granted either authorization to sublet or allowed to rent the rental unit under their own tenancy agreement. The Tenants and their lawyer also questioned the authenticity of the Agent's testimony that the rental unit was posted for re-rental expediently, pointing to print outs from several sites on various dates after notice to end the tenancy was given, showing that there were no advertisements up for the rental unit on those sites at that time.

The Agent provided a statement of outstanding expenses in the amount of $3,200.00 showing a $1,050.00 charge for liquidated damages, a $2,100.00 charge for outstanding November 2021 rent, a $25.00 late fee for November 2021, and a $25.00 NSF charge. The Agent also provided individual invoices for the above noted charges, a copy of the tenant/rent ledger, and a monetary order worksheet. The Tenants provided a chronology of events, copies of numerous email correspondence between themselves and agents for the Landlord, screenshots from a social media site regarding their attempts to get the rental unit re-rented, correspondence from the rent payment service provider regarding the discontinuance of rent payment authorization, and screenshots of seven popular online rental sites for the area in which the rental unit is located on various dates which they argue demonstrate that the rental unit was not posted for re-rental expediently by the Landlord as required.

Analysis

Based on the affirmed testimony of the parties and the documentary evidence before me, I find that the tenancy ended on October 27, 2021, when the Tenants vacated the rental unit and completed the move-out condition inspection and report, after having

given written notice on September 2, 2021, to end the tenancy effective October 31, 2021. I also find that the Tenants paid rent in full for the month of October 2021, and that the Tenants provided their forwarding address in writing to the Landlord on November 7, 2021.

Policy Guideline #3 states that where a tenant vacates or abandons the premises before a tenancy agreement has ended, the tenant must compensate the landlord for the damage or loss that results from their failure to comply with the legislation and tenancy agreement which can include unpaid rent to the date the tenancy agreement ended and rent the landlord would have been entitled to for the remainder of the term of the tenancy agreement. As the parties were agreed that rent was paid in full for October 2021, and I have already found above that the tenancy ended on October 27, 2021, I therefore find that there was no outstanding rent owed at the time the tenancy ended. However, I will now turn my mind to whether the Landlord is entitled to any loss of rent on or after November 1, 2021. The parties disputed whether the Landlord acted reasonably to have the rental unit re-rented expediently at a reasonably economic rate, and therefore whether the Tenants were responsible for any loss of rent after the date the tenancy ended. For the following reasons, I am not satisfied that the Landlord acted reasonably to mitigate their loss of rent after the end of the tenancy, and I therefore find they are not entitled to any loss of rent after the end of the tenancy in October of 2021.

It is clear to me from the testimony of the parties and their agents at the hearing, and the documentary evidence before me, that the Tenants made numerous attempts to find suitable new tenants to sublet the rental unit or to assign the tenancy to, and that the Landlord unreasonably withheld consent for them to either sublet the rental unit or assign the tenancy. Section 34(2) of the *Act* states that if a fixed term tenancy agreement has 6 months or more remaining in the term, which I find this tenancy agreement did at the time the Tenants requested authorization to sublet the rental unit, the landlord must not unreasonably withhold consent to assign the tenancy or sublet the rental unit.

In an email dated September 2, 2021, between the Tenants and an agent for the Landlord S.L., the agent states “We do not authorize subletting for several reasons…” and “We authorize “assignments” over “subletting”…” In an email dated September 3, 2021, between the Tenants and an agent for the Landlord T.C., the agent states, “if requested, we will not be giving you consent to reassign your lease...” and “If requested, we will not be giving you consent to sublet your lease…”. Although the Agents for the Landlord accused the Tenants via email of fraudulently representing themselves as the

Landlords, and used this as at least a partial basis for their refusal to allow the Tenants to assign the tenancy or sublet the rental unit, the documentary evidence before me from the Tenants, including emails with the agents for the Landlord and copies of social medial posts, clearly demonstrates to my satisfaction on a balance of probabilities that the Tenants were simply attempting to find prospective new tenants to sublet the rental unit or assign the tenancy to in order to mitigate any potential loss suffered by them as a result of terminating their fixed term tenancy agreement early, and spreading awareness of the Landlord's own rental advertisement. As a result, I do not find it reasonable for them to have withheld consent for this purpose. Further to this, it is clear to me from the above email excerpt dated September 2, 2021, that the Landlord simply has a policy against subletting rental units, which is contrary to the requirements set out under section 34(2) of the *Act*.

Finally, although the Agent argued at the hearing that the majority of the prospective tenants who applied were unsuitable, and that therefore the rental unit could not be re-rented until January 7, 2022, the Tenants and their lawyer questioned the authenticity of this testimony and I note that no documentary evidence was submitted in support of it. Section 7(2) of the *Act* states that a landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with the *Act*, the regulations or the tenancy agreement must do whatever is reasonable to minimize the damage or loss. This is reiterated in Policy Guideline #3 which states that even where a tenant ends their fixed term tenancy early, the landlord must do whatever is reasonable to minimize their damage or loss, including re-renting the premises as soon as reasonable for a reasonable amount of rent.

Although the Tenants submitted multiple screen shots from seven rental sites over a period of time which demonstrate to my satisfaction that the rental unit was not posted for re-rental on those sites as of those dates and times, no documentary evidence was submitted by the Landlord or their agents in support of the Agent's testimony that the rental unit was posted for re-rental expediently at a reasonable rate, and that the rent was reduced in December of 2021 when a suitable new tenant had not been found. Based on the above, I find that the Landlord has failed to satisfy me on a balance of probabilities that they complied with the requirements set out under section 7 and 34 of the *Act* and I therefore dismiss their claim for recovery of any lost rent in relation to this tenancy after the end of the tenancy in October of 2021, without leave to reapply.

For the following reasons I also dismiss the Landlord's claims for any NSF and late fees after October 31, 2021, without leave to reapply. I find that it was unreasonable for the

Landlord to attempt to withdraw funds for the payment of rent after the end of the tenancy in October of 2021, as they knew as early as September 1, 2021, that the Tenants wished to end their tenancy at the end of October. Further to this, although tenants may be liable for loss of rent after the end of a tenancy, I find that lost rent is not the same as late rent, and therefore a late fee cannot be charged by a landlord to a tenant after the end of a tenancy, even in circumstances where a tenant may still be liable for loss of rent.

The parties disputed whether the tenancy agreement contained an enforceable liquidated damages clause, and for the following reasons, I find that it did not. Although section 4.16 of the tenancy agreement is titled “LIQUIDATED DAMGES” and states that one half month’s rent will be due as liquidated damages, not as a penalty, for ending the fixed term tenancy early, based on the documentary evidence before me from the Tenants and their lawyer, I am satisfied that the amount sought by the Landlord in this Application under section 4.16 is actually a penalty and therefore unenforceable. In an email dated September 2, 2021, S.L stated, “In a sublet scenario, we would still charge liquidated damages as well.” I find this statement inconsistent with the purpose of a liquidated damages clause, as although the tenant(s) under the original tenancy agreement temporarily transfer their rights under the tenancy agreement to a subtenant, this transfer is for a shorter term than the total term of the original fixed term of the tenancy agreement and the original tenant(s) remain ultimately responsible under the original tenancy agreement for the duration of the fixed term. As a result, I find that the original fixed term tenancy agreement would not have been breached or ended early by the Tenants if a sublet had been approved, and therefore any valid liquidated damages clause would not have been triggered.

Further to this, section 34(2) of the *Act* states that if a fixed term tenancy agreement has 6 months or more remaining in the term, which I find this tenancy agreement did at the time the Tenants requested authorization to sublet the rental unit, the landlord must not unreasonably withhold consent to assign or sublet the rental unit. As set out above, I have already found that the Landlord and/or their agents unreasonably withheld consent to assign or sublet the rental unit, which in my opinion further demonstrates, in conjunction with the above noted email excerpt, that the liquidated damages clause that the Landlord subsequently attempted to enforce, was meant as a penalty to the Tenants, and not a genuine pre-estimate for loss.

Finally, two separate agents for the Landlord in two separate emails on two separate dates referred to the $1,050.00 being sought as liquidated damages under section 4.16

of the tenancy agreement, as a penalty. In an email dated September 2, 2021, S.L. stated “There is no option to avoid the half month’s rent penalty outlined in your lease agreement for terminating your lease early.” In an email dated November 8, 2021, the Agent S.P. stated “As for the security deposit you will not be getting that reimbursed to you. As per the lease agreement you signed, the security deposit is liquidated damage. When you broke your lease you waived your claim to this deposit.”

From the above noted email excerpts, it is clear to me that the Landlord and their agents believe that the Tenants owe a penalty of one half month’s rent for ending their fixed term tenancy early, that the security deposit could automatically be withheld at the end of the tenancy if they broke their lease, contrary to section 20(e) of the *Act*, and that even if subletting or assignment had been permitted, which it was not, this penalty would still apply. As set out in Policy Guideline #4, 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. Based on the above, and as neither the Landlord nor their agents submitted any documentary or other evidence to suggest, let alone satisfy me on a balance of probabilities, that the amount sought was a genuine pre-estimate of loss, I therefore find that it is not. As a result, I find that the amount sought for liquidated damages is actually a penalty and I therefore dismiss the Landlord’s claim for this amount without leave to reapply. As the Landlord was unsuccessful in their claims, I decline to grant them recovery of the $100.00 filing fee.

Having made the above findings, I will now turn to the matter of the $1,050.00 security deposit. Although the parties made arguments at the hearing about whether or not the Landlord extinguished their right to claim against the security deposit as a result of how and when the Tenants obtained a copy of the move-in condition inspection report, as the Application seeking authorization to withhold the deposit was filed within the time period set out under section 38(1) of the *Act*, and none of the claims relate to damage to the rental unit, I therefore find it unnecessary to make a determination in this regard. However, Policy Guideline #3 states under section C that the arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the *Act*, on a landlord’s application to retain all or part of the security deposit, unless the tenant’s right to the return of the deposit has been extinguished under the *Act*. It also states that the arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for dispute resolution for its return.

As there is no evidence before me that the Tenants extinguished their right to the return of their security deposit, I find that they did not. As a result, and in accordance with Policy Guideline #3, I therefore grant the Tenants a Monetary Order in the amount of $1,050.00 for the return of their security deposit, and I order the Landlord to pay this amount to the Tenants.

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 **$1,050.00**. The Tenants are 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.

This decision has been rendered more than 30 days after the close of the proceedings, and I sincerely apologize for the delay. However, 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). As a result, I find that neither the validity of this decision and the associated order, nor my authority to render them, are affected by the fact that this decision and the associated order were issued more than 30 days after the close of the proceedings.

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: August 24, 2022

Residential Tenancy Branch