Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, MNDL, FFL**

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agent (the "landlord").

In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given an opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

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 the landlord entitled to the relief sought?

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.

The parties agree on the following background facts. This fixed-term tenancy began on April 1, 2021 and was scheduled to end on March 31, 2022. The monthly rent was $2,025.00 payable on the first of each month. A security deposit of $1,012.50 was paid at the start of the tenancy and is still held by the landlord. No condition inspection report was prepared at the start of the tenancy.

The tenant gave written notice to end the tenancy by a letter dated January 1, 2022. The parties agree the tenant vacated the rental unit and the tenancy ended by January 31, 2022. The parties met to perform a move-out inspection on January 31, 2022. The tenant disagreed with the landlord's assessment of damages and did not authorize the landlord to make any deductions from the deposit. The tenant provided a forwarding address in writing on the inspection report of January 31, 2022.

The landlord submits that the rental unit required cleaning and work due to the condition left by the tenant. The central portion of the landlord's claim is the concrete patio which the landlord says was stained and requires new concrete to be installed. The landlord submitted some photographs of the rental property into evidence.

A copy of the tenancy agreement was submitted into evidence. The signed tenancy agreement includes the following clause:

> LIQUIDATED DAMAGES.
> If the Tenant(s) ends the fixed term tenancy before the original term as set out in the Residential Tenancy Agreement, the Landlord may treat the agreement as being at an end. In such an event, rent totalling the amount that is owing between the end of the tenancy and the end of the fixed term in the Residential Tenancy Agreement will be paid by the Tenant(s) to the Landlord as liquidated damages, and not as a penalty, to cover the Landlords cost of re-renting the rental unit and

must be paid in addition to any other amounts owed by the Tenant(s), such as unpaid rent or for damage to the rental property

The landlord seeks a monetary award of $4,050.00, the rent payable for February and March, 2022 as liquidated damages.

The landlord submits that they believe the tenant has an additional occupant in the rental suite, named as the respondent JD in the present application, and an additional pet that was not disclosed to the landlord. The landlord seeks an award of $3,000.00 each for the additional occupant and pet. The landlord confirmed there is no clause in the tenancy agreement pursuant to section 13(2)(f)(iv) stating that the amount of the rent varies with the number of occupants. When questioned how the landlord arrived at the monetary amounts sought, they explained they based the figure on what they believe they could have obtained given the rental housing market.

The landlord testified that they believe the tenant had an additional occupant based on vehicles observed parked at the rental property. The landlord testified that they were aware the tenant had an additional occupant as well as an additional pet since about August 1, 2021. The landlord said they did not previously inform the tenant they were in breach of any portion of the tenancy agreement due to these additional residents, nor did they seek to amend the tenancy agreement or seek additional rent based on the number of occupants until filing the present application.

The tenants dispute the landlord's claim in its entirety.

Analysis

Section 38 of the *Act* requires the landlord to return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. In the present case the parties agree the tenancy ended on January 31, 2022 with the tenant providing a forwarding address on that date and the landlord filed their application for dispute resolution on January 30, 2022. Accordingly, I find the landlord was within the statutory timeline to file their application.

Section 24(2) of the *Act* provides that the right of a landlord to claim against a security deposit is extinguished if they do not comply with the requirements of section 23 in

offering the tenant 2 opportunities for an inspection and completing a condition inspection report at the start of the tenancy.

I accept the undisputed evidence of the parties that the landlord did not offer opportunities for the tenant to participate in an inspection at the start of the tenancy. The copy of the inspection report submitted into evidence is unsigned by either party and does not provide a date for the move-in inspection. The report contains typewritten list of elements purporting they are new and unused, but I find no evidence that the report was prepared after an examination of the building elements by the parties together as required.

I find the landlord's submission about declining to schedule a move-in inspection in consideration of the tenant's time to be unreasonable, contrary to their requirement under the *Act* and no excuse for their failure. The landlord also claims they were never contacted by the tenant with a request to schedule an inspection. Pursuant to section 23 of the *Act* it is the landlord who must offer the tenant at least 2 opportunities for an inspection. The landlord cannot shift the onus to the tenant to schedule an inspection or prepare the condition inspection report. A landlord is in the business of providing rental property for monetary consideration and I find it reasonable to expect they are familiar with the *Act* and regulations and their requirements.

I find the landlord did not prepare a move-in condition inspection report as required under the *Act*. Therefore, I find the landlord has extinguished their right to claim against the deposit for this tenancy and the tenant is entitled to a return of the deposit for this tenancy in the full amount of $1,012.50.

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.

In the absence of a proper condition inspection report prepared in accordance with the Act and regulations I am not satisfied with the evidence of the landlord that the rental unit incurred damage attributable to the tenancy. I find the handful of photographs of

the outdoor patio area submitted by the landlord to show the expected wear and tear from ordinary use of a building element exposed to the elements. I find the photographs to be of limited probative value as they appear to show different areas of the rental property and most are undated. I find the estimate provided by the third-party company to be for work that is more in the nature of replacing the concrete rather than any reasonable work to restore to a pre-tenancy condition. I find the landlord's suggestion that a concrete patio was degraded over a period of a 10 month tenancy to such a degree that it needs to be replaced to be unreasonable, not be supported in the evidence and have little air of reality.

I find no damage to the rental unit that is attributable to the tenancy such that it would give rise to a monetary award.

The landlord submits that the balance of the rent payable for the fixed-term became immediately payable under the Liquidated Damage clause of the tenancy agreement when the tenant gave notice to end the tenancy.

Residential Tenancy Policy Guideline 4 provides the following information on liquidated damages:

> 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.

Section 22 of the Act states:

> A tenancy agreement must not include a term that all or part of the rent payable for the remainder of the period of the tenancy agreement becomes due and payable if a term of the tenancy agreement is breached.

It is evident that the clause the landlord purports is a liquidated damage clause is actually an acceleration term specifically prohibited under the *Act*. I find that the requirement for the tenant to pay all of the rent payable for the term of the tenancy agreement is not a pre-estimate of loss but an extravagant amount greater than the reasonable loss that would follow a breach. I find this is not a genuine and enforceable

liquidated damage clause in the tenancy agreement. I therefore find it to be unenforceable and the landlord is not entitled to a monetary award as claimed.

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."

As set out in section 45(2) a tenant may end a fixed term tenancy by giving notice effective on a date no earlier than the date specified in the tenancy agreement and not earlier than one month after the date the notice is given.

In the present case the parties agree that the tenant gave written notice on January 1, 2022 and I find the earlies it would have been effective is March 31, 2022, the date specified on the fixed-term tenancy agreement. While I find that the tenant breached the tenancy agreement by ending it before its full term, I find that the landlord has failed to demonstrate that any losses are due to the tenant rather than the landlord's own failure to mitigate their losses.

The landlord gave no evidence about the steps taken to find a new occupant for the rental unit. The landlord provided no copies of advertisements or correspondence with prospective tenants. I find little evidence was provide of what actions or steps, if any, were taken by the landlord in an effort to mitigate their rental income losses.

Given that the tenant gave clear notice on January 1, 2022 and vacated the rental unit by January 31, 2022, I find no reason why the landlord could not have found a new occupant for the rental unit. Given the rental housing market in the province I find it patently unreasonable for a landlord to be unable to find a new occupant given over four weeks notice. I find that any losses incurred by the landlord is not attributable to the

breach on the part of the tenant but due to the landlord's failure to take reasonable steps. Accordingly, I find no basis for a monetary award.

Similarly, I find the landlord has provided little evidence in support of the parts of their application seeking a monetary award for the additional occupant and pet. The landlord submits that unapproved occupants or pets is a breach of a term of the tenancy agreement. The landlord provided little evidence to support their belief that there is an additional occupant or pet, no documentary evidence was submitted and I find the landlord's submissions do not rise above the realm of conjecture.

I further find little evidence that the landlord has incurred any monetary damages or losses if such a breach occurred. The landlord seeks a monetary award of $6,000.00 for the occupant and pet but I find their explanation of how they calculated this amount to have no merit. Based on the landlord's own testimony they were fully aware of the presence of an additional occupant and pet in the rental property and took no steps to enforce any terms of the tenancy agreement nor did they communicate to the tenant that they believed there to be a breach of the agreement. The landlord now claims a monetary award but I find they have not adequately explained how their belief of a breach has resulted in any monetary loss.

I further note that the landlord testified that they were aware of the additional occupant and pet since August 2021 and took no steps prior to the present application for dispute resolution. If there was a breach, and if the landlord had incurred a loss, I would ultimately find that the landlord, by failing to take any action has waived their right to pursue a monetary award and are estopped from enforcing these portions of the tenancy agreement.

Estoppel is a legal principle whereby a party is barred from enforcing a contractual right when it is inequitable to do so due to the party's previous conduct or representations.

In order to successfully raise an estoppel defence, the party seeking to defeat the rights of the other must show:

1. that the party seeking to enforce their legal rights, took some action, whether by representation or conduct, with the intention that the other party rely on that action; and
2. the other party relied on that action to its detriment changing their course of action based on the representation.

If there was an additional occupant and pet residing in the rental unit since August 1, 2021 with the full awareness of the landlord, then by their failure to take any actions I find the landlord would have clearly represented that the occupants were allowed. I find that, in such a case, the tenant would have relied upon such a representation in continuing the tenancy and the landlord would be subsequently estopped from pursuing a monetary award months after the fact.

In any event, I find the landlord has failed to meet their evidentiary onus on a balance of probabilities. I find the landlord has not demonstrated that there has been any breach of the Act, regulations or tenancy agreement on the part of the tenants that would give rise to a monetary award. Accordingly, I dismiss the landlord's application.

As the landlord was not successful in their application they are not entitled to recover their filing fee from the tenants.

Conclusion

The landlord's application is dismissed in its entirety without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of $1,012.50, representing the return of the full amount of the security deposit for this tenancy. 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 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: September 15, 2022

Residential Tenancy Branch