Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCT, MNSD, FFT**

Introduction

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

1. An Order for compensation for a monetary loss or other money owed pursuant to Section 67 of the Act;
2. An Order for the return of the security deposit that the Landlord is holding without cause pursuant to Section 38 of Act; and,
3. Recovery of the application filing fee pursuant to Section 72 of the Act.

The hearing was conducted via teleconference. The Landlord's Agent and the Tenants attended the hearing at the appointed date and time. Both parties were each given a full opportunity to be heard, to present affirmed testimony, to call witnesses, and make submissions.

Both parties were advised that Rule 6.11 of the Residential Tenancy Branch (the "RTB") Rules of Procedure prohibits the recording of dispute resolution hearings. Both parties testified that they were not recording this dispute resolution hearing.

Both parties acknowledged receipt of:

- the Tenants' Notice of Dispute Resolution Proceeding package and evidence served by Canada Post registered mail on April 1, 2022, the Landlord confirmed service on April 4, 2022;

- the Landlord's evidence package was served by Canada Post registered mail on October 3, 2022, Canada Post Tracking Number is included on the cover sheet of this decision, deemed served on October 8, 2022.

Pursuant to Sections 71, 88, 89 and 90 of the Act, I find that both parties were duly served with all the documents related to the hearing in accordance with the Act.

Issues to be Decided

1. Are the Tenants entitled to an Order for compensation for a monetary loss or other money?
2. Are the Tenants entitled to an Order for the return of the security deposit that the Landlord is holding without cause?
3. Are the Tenants entitled to recovery of the application filing fee?

Background and Evidence

I have reviewed all written and oral evidence and submissions before me; however, only the evidence and submissions relevant to the issues and findings in this matter are described in this decision.

The parties confirmed that this tenancy began as a fixed term tenancy on January 1, 2022. The fixed term was to end on December 31, 2022. Monthly rent was $2,895.00 plus $100.00 for parking payable on the first day of each month. A security deposit of $1,447.50 and a pet damage deposit of $1,447.50 were collected at the start of the tenancy and are still held by the Landlord.

In just over a month, the Tenants' concerns with the noise and mess in and on the residential property was too much for the Tenants and they stated they advised the Landlord that they would be vacating their rental unit.

The tenancy agreement for the rental unit has a Liquidated Damages clause which the Tenants initialled and states:

> *If the Tenant ends this tenancy agreement in less than 12 months from the start of this tenancy agreement, the Tenant agrees to pay $1000 to the Landlord as a genuine pre-estimate of the Landlord's costs for re-renting the rental unit, which costs include advertising and administration. The Tenant(s) agree that the liquidated damages fee is due and payable at the time they*

> *give notice of their intention to end this agreement prior to the date originally agreed to.*

The Tenants signed a '*Late Vacate Notice and Agreement to Vacate*' which included a term stating:

> *…*
> *2. I/We agree to be responsible for any rent payable to the last day of March, 2022 if the suite aforesaid is not re-rented to another Tenant. The Landlord will make all reasonable attempts to re-rent the suite after the receipt of this notice of termination by the Tenant. I/We agree to allow [**property management company**] to retain the security deposit for outstanding rent.*
> *…*
> *I/We undersigned, being a duly authorized representative of the Landlord, agree to make all reasonable attempts on behalf of the Landlord, to re-rent the suite aforesaid.*
> *[unsigned]*

This one-page agreement also provided the Tenants' forwarding address.

The Tenants do not believe that the Landlord made a reasonable effort to find a new tenant for March 1, 2022. The Tenants were told by the leasing associate and the building manager that there would be no problem filling the unit due to the large wait list. The Tenants did not find any advertisements for the rental unit on the websites that the Landlord stated they used to advertise their rentals. The Tenants wrote the leasing associate and asked when advertisements for their rental unit would be posted online, and the leasing associate wrote back stating,

> *I feel like you should concentrate on your move out.*
>
> *I am fully capable of doing my job and I have a wait list that I am working my way through before I put up ads to add more people to my wait list.*
>
> *I have a few showings booked and will give you proper notice if it concerns you.*
>
> *Your building manager will be contacting you tomorrow to discuss your move out details and schedule your move out.*

The Tenants argued that the vacancy rate in the city is less than 1%, and state they should not be penalized if the Landlord did not advertise.

The Tenants completed a move-in condition inspection of the rental unit on January 1, 2022. The tenancy ended February 28, 2022. The Tenants completed a move-out condition inspection on February 28, 2022. The Landlord filled in the section stating, "*The undersigned Tenant(s) agrees that [**property management company**] may deduct $1,000.00 (TOTAL CHARGES from PAGE 1)". The Tenants placed an asterisk beside the dollar amount, and wrote on the bottom of the condition inspection report, "*PENDING DISPUTE/ARBITRATION WITH [**PROPERTY MANAGEMENT COMPANY**]".*

The Tenants' forwarding address was included on the bottom of the move-out condition inspection report.

The Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy. The Tenants argued that they did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the deposits. The Landlord did not apply to the RTB to claim the liquidated damages or keep the deposits.

The Landlord testified that the liquidated damages are used for advertising, interviewing, showings, processing applications, evaluating potential tenants, creating new documentation, doing move-in condition inspections, and setting up the new tenants in their system.

The Landlord stated they advertise in multiple online platforms, and they work from their wait list. When a unit comes up to rent, the department automatically uploads it to the websites. The Landlord does not know why the rental unit was not on their website, he said, "*it should have been*." The Landlord stated the rental unit should have also been uploaded to the online platforms.

The Tenants gave their notice to vacate on February 7, 2022. The Landlord had 21 days to find a new tenant. He said, timing-wise, new tenants would have had to give their landlords notices to vacate before February 1, 2022. The Landlord agreed they did have someone lined up to move in on March 1, 2022, but it fell through.

Analysis

Section 38 of the Act sets out the obligations of a landlord in relation to a security and pet damage deposits held at the end of a tenancy.

Section 38(1) requires a landlord to return the security deposit in full or file a claim with the RTB against it within 15 days of the later of the end of the tenancy or the date the landlord receives the tenant's forwarding address in writing. There are exceptions to this outlined in Sections 38(2) to 38(4) of the Act.

I accept that the tenancy ended on February 28, 2022, and that the Tenants' forwarding address was provided to the Landlord in writing on February 7 and 28, 2022.

February 28, 2022 is the relevant date for the purposes of Section 38(1) of the Act. The Landlord had 15 days from February 28, 2022 to repay the security deposit in full or file a claim with the RTB against the deposits.

The Landlord did not repay the deposits or file a claim with the RTB against the deposits within 15 days of February 28, 2022. Therefore, the Landlord failed to comply with Section 38(1) of the Act.

Sections 38(2) to 38(4) of the Act state:

> *38 …*
>
> *(2) Subsection (1) does not apply if the tenant's right to the return of a security deposit or a pet damage deposit has been extinguished under section 24 (1) [tenant fails to participate in start of tenancy inspection] or 36 (1) [tenant fails to participate in end of tenancy inspection].*
>
> *(3) A landlord may retain from a security deposit or a pet damage deposit an amount that*
>
> *(a) the director has previously ordered the tenant to pay to the landlord, and*
>
> *(b) at the end of the tenancy remains unpaid.*
>
> *(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,*

> *(a) 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…*

The Tenants participated in a move-in and move-out condition inspection with the Landlord and therefore did not extinguish their rights in relation to the deposits. Section 38(2) of the Act does not apply.

The Tenants' tenancy agreement had a liquidated damages clause, but I find the Landlord has made no claim against the Tenants seeking to enforce this clause. The Tenants noted on the bottom of the move-out condition inspection that the $1,000.00 charge was "*pending dispute/arbitration with [property management company]".* I find that the Tenants did not agree to the Landlord retaining the $1,000.00 at the end of the tenancy and find that the Landlord retaining this sum is not substantiated on the totality of evidence on this matter. The Landlord did not have an outstanding monetary order against the Tenants at the end of the tenancy. Section 38(3) of the Act does not apply.

The Tenants signed the Late Vacate Notice and Agreement to Vacate. The Tenants said the Landlord did not advertise the availability of the rental unit. The leasing associate said, "*I am fully capable of doing my job and I have a wait list that I am working my way through before I put up ads to add more people to my wait list*." The Landlord said he did not know why the rental unit remained unadvertised. The Landlord did not execute this one-page agreement. I find the Landlord did not take all reasonable steps to re-rent the unit after receipt of the vacate notice and effectively were in breach of their agreement. I find that Section 38(4) of the Act does not apply.

Given the above, I find the Landlord failed to comply with Section 38(1) of the Act in relation to the security and pet damage deposits and that none of the exceptions outlined in Sections 38(2) to 38(4) of the Act apply. Therefore, the Landlord is not permitted to claim against the security and pet damage deposits and must return double the security and pet damage deposits to the Tenants pursuant to Section 38(6) of the Act.

The Landlord must return $5,790.00 to the Tenants. There is no interest owed on the security and pet damage deposits as the amount of interest owed has been 0% since 2009.

As the Tenants were successful in their application, I award the Tenants reimbursement for the $100.00 filing fee pursuant to Section 72(1) of the Act.

In total, the Tenants are entitled to $5,890.00 and I issue the Tenants a Monetary Order for this amount.

Conclusion

The Tenants are issued a Monetary Order for $5,890.00. This Order must be served on the Landlord as soon as possible. If the Landlord fails to comply with the Order, the 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 Act.

Dated: November 02, 2022

Residential Tenancy Branch