DECISION

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- a monetary order pursuant to ss. 67 and 38 compensating for loss or other money owed by claiming against the deposit; and
- return of the filing fee pursuant to s. 72.

The Tenants file their own application, seeking the following relief under the *Act*:

- a monetary order pursuant to s. 67 for compensation or other money owed;
- an order pursuant to s. 38 for the return of the security deposit and/or the pet damage deposit; and
- return of the filing fee pursuant to s. 72.

J.C. attended as the Landlord's agent. The agent was represented by counsel, J.P., who spoke on his behalf. R.K. and K.E.H. attended as the Tenants.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

Service of the Applications and Evidence

The parties advise that they served their application materials on the other side, including an amendment filed by the Tenants on October 13, 2024. Both parties acknowledge receipt of the other's application materials. The Tenants indicate they received some late evidence from the Landlord on October 24, 2024, though raised no objection to its inclusion.

Accepting the above, I find that pursuant to s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials. I include the Landlord's late evidence as the Tenants raised no objections despite their awareness that it was late within the meaning of Rule 3.17 of the Rules of Procedure., such that I accept there is no prejudice to doing so.

Preliminary Issue – Withdrawal of the Landlord's Monetary Claim

At the outset of the hearing, counsel advised that the Landlord would withdraw their claim for compensation, choosing not to pursue it and returning the Tenants' security deposit. I am told the security deposit has not been returned yet.

I accept that the Landlord is not pursuing its claim such that I do not make any findings on their underlying monetary claim. I do not grant the Landlord their filing fee, which is dismissed without leave to reapply.

I note that the Landlord claimed against the security deposit, retaining it, which is why the Tenants' filed their application seeking its return. I accept that issues pertaining to the return of the security deposit must be addressed, though do so on the Tenants' application.

Issues to be Decided

1) Are the Tenants' entitled to compensation for losses caused by the Landlord's breach of the *Act*, Regulations, or the tenancy agreement?
2) Are the Tenants entitled to the return of their security deposit?
3) Are the Tenants entitled to the return of their filing fee?

Evidence and Analysis

I have reviewed all evidence, including the testimony of the parties, but will refer only to what I find relevant for my decision.

General Background

The parties confirm the following details with respect to the tenancy:

- The Tenants moved into the rental unit on July 1, 2024.
- The Tenants vacated the rental unit on July 2, 2024.
- Rent of $2,795.00 was due on the first day of each month.
- A security deposit of $1,397.50 was paid by the Tenants.

I have been provided with a copy of the written tenancy agreement.

1) Are the Tenants' entitled to compensation for losses caused by the Landlord's breach of the Act, Regulations, or the tenancy agreement?

Under s. 67 of the *Act*, the Director may order that one party compensate the other if damage or loss result from their failure to comply with the *Act*, regulations, or tenancy agreement.

Policy Guideline #16, summarizing the relevant principles from ss. 67 and 7 of the *Act*, sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the tenancy agreement.
2. Loss or damage has resulted from this non-compliance.
3. The party who suffered the damage or loss can prove the amount of or value of the damage or loss.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Summary of the Tenants' Claims

The Tenants the amendment to their claim, seek compensation of $8,128.11, describing their claim as follows:

> 1. The costs related to the move-in was removed from the original claim because we would have moved-in to another unit regardless of the dispute.
> 2. We added additional days regarding AH's illness that was affected by the dispute.

In their original application, the claim was pled as follows:

> Landlord's agent breached a material term by misrepresenting the unit size as 725 sq. ft.; the actual size is only 594 sq. ft., an 18% overstatement. He also provided a false floor plan and photo corresponding to a different larger unit. We were living in Toronto and could not view the unit in-person, which required us to rely on information provided by the agent. The sq. ft. was critical to us as we are planning to have a baby. This resulted in significant distress and loss of time and money.

The particulars of the Tenants' claim are outlined in a monetary order worksheet submitted into evidence.

Alleged Misrepresentation

The Tenants alleged that the Landlord misrepresented the size of the rental unit. I am told that they were living in Toronto in June 2024 when they responded to the Landlord's advertisement for the rental unit on Craigslist. The Tenants say the rental unit was advertised as being 725 ft^2 in size. The Tenant's evidence contains a copy of the advertisement they said they replied to, which does note the size of the rental unit mentioned by the Tenants at the hearing.

The Tenants tell me that they viewed the rental unit virtually on June 12, 2024. I am told that the this occurred by video call, that it lasted approximately 12 minutes, and that the Landlord's agent J.C. was the one conducting the walkthrough.

The Tenants say they asked the Landlord's agent for a floorplan of the rental unit, which the Landlord's agent gave to them on June 12, 2024. The Landlord's evidence contains a copy of the email from the Landlord's agent sent on June 12, 2024 that included the floorplan.

The Landlord's evidence contains another email from the Landlord's agent sent to the Tenant K.E.H. on June 13, 2024 where he says that "[p]lease note that the provided floor plan is a generic one for the building's one bedroom and flex units taken from their building website". The Landlord's agent goes on to say that there are some differences between the rental unit and the floorplan he provided.

The Tenants advise that they signed the tenancy agreement on June 16, 2024 based on the information from the Craigslist advertisement, the floorplan given to them on June 12, 2024, and their virtual viewing on June 12, 2024.

The Tenants tell me that they discovered the rental unit was smaller than the 725 ft^2 advertised when they took possession on July 1, 2024. I am told they said to the agent at the move-in inspection that the rental unit felt smaller than 700 ft^2, following up by text message to the agent on the same day. In response to the Tenants' text message, the Tenants say the Landlord's agent confirmed the size of the rental unit being just shy of 700 ft^2.

The Tenants' evidence contains a copy of the text message from the Landlord's agent on July 1, 2024, which says "I believe it is shy of 700" when asked by the Tenant K.E.H. to confirm the size of the rental unit. The message goes on to say that this estimate excludes the balcony.

Upon further investigation by the Tenants in the days that followed, they discovered that the rental unit is 583 ft^2 in size, excluding the balcony. I am told the Tenants obtained this from the building's original developer, with their evidence containing an email with a representative from the builder dated July 11, 2024 which contained the floorplan for their rental unit.

The Tenants explained that they both work from home and that they plan on trying to have a child in the near future. They stressed that they needed a rental unit that was at least 700 ft^2 to accommodate their current and future needs. The Tenants argue they would not have signed the tenancy agreement for the rental unit had they known its size and that they turned down other rental units in their search during June 2024.

The Tenants argue at the hearing that the Landlord fraudulently misrepresented the size of the rental unit. It was argued that the Landlord should have known how big the rental unit had been since they were the original owner and this information would have been given to them, if not at the time of purchase, then at least in the property tax assessments sent out to them by BC Assessment.

In their written submissions, the Tenants indicate that they asked for compensation from the Landlord due to breach of a material term of the tenancy agreement. At the hearing, the Tenants did not clearly state this position, though say that they are seeking a

reduction in their rent payment for July 2024 based on the square footage delivered by the Landlord versus what they believed they had contracted for.

Findings

I find it useful to differentiate between some of the various terms used by the Tenants in their claim.

Within contract law, representations are made by one party to another in the context of their negotiations when forming a contract. To be considered a representation, it must be a significant statement of fact that induces the contract and, unlike a puff, must be a statement in which a reasonable person might rely upon. Sometimes a representation may form part of a contract as a term if it forms part of the offer.

A misrepresentation, to be operative, must be a statement of fact that is relied upon by one party to enter the contract which is both untrue and material. If a misrepresentation is found to occur, the effect is that the party who relied upon the misrepresentation may rescind the contract, which is to say it is voidable at their option.

For example, if one party were to agree to purchase 10 bushels of grain upon the seller representing it was of a certain quality, only to have an inferior quality delivered, the purchaser could rely upon the misrepresentation to avoid their obligation to purchase the grain. In short, both sides are absolved of their obligations under the contract. No grain delivered and no money paid.

I note that none of the correspondence provided to me show the Tenants requested the square footage for the rental unit, nor did the Landlord's agent represent its size, prior to the tenancy agreement being signed on June 16, 2024. In other words, there were no enquiries on the size until after they signed the agreement and moved into the rental unit.

I accept that the Craigslist advertisement in the Tenants' evidence was the one to which they responded, which notes the rental unit was 725 ft^2 in size. However, the Tenants also viewed the rental unit on June 12, 2024, then signed the agreement.

In other words, even if the rental unit was advertised as being a certain size, the Tenants made their own assessment on whether the rental unit would meet their needs. Clearly it did since they signed the tenancy agreement based, in part, on the virtual viewing on June 12, 2024. In my view, the fact that the Tenants did undertake their own inquiry, viewing the rental unit on June 12, 2024, they cannot reasonably argue that the advertisement induced them to enter into the tenancy agreement.

I acknowledge that it may be difficult to ascertain the size for a space by way of virtual viewing. Considering this, the Tenants did ask for a floor plan, which was delivered to them on June 12, 2024. There was some contention from the Tenants that the Landlord's agent represented it as being reflective of the rental unit. With respect, the email sent by the agent on June 13, 2024 outlined it did not portray the rental unit.

The Tenants could not reasonably rely upon the floorplan received on June 12, 2024 when making their assessment on whether the rental unit met their needs. In the face of the response from the Landlord's agent on June 13, 2024 that the floorplan was inaccurate, the Tenants did not ask for additional information from the Landlord's agent, only doing so after they signed the tenancy agreement and conducted the move-in condition inspection.

This brings me to the most significant issue I have with the Tenant's claim. Even if the rental unit's square footage in the advertisement is held as a misrepresentation, a point for which I doubt, the remedy is to rescind the contract. What this means is that they would be absolved from their ongoing obligations. However, the Tenants did not make this election, instead giving the Landlord post-dated rent cheques.

The Tenants seek damages for the alleged misrepresentation. With respect, a claim for damages is not permitted under s. 67 of the *Act* unless the misrepresentation can be viewed as a term to the tenancy agreement being included in an offer that was accepted by the Tenants. In these circumstances, I find that the square footage cannot be a term of the tenancy agreement.

First, the written tenancy agreement, the one signed by the parties, is completely silent with respect to the size of the rental unit. To the contrary, clause 7 of the tenancy agreement addendum clearly states that the Tenants' agreed to take on the rental unit "as is". I accept they did so upon viewing the rental unit themselves on June 12, 2024.

Second, since this is a written agreement, the parol evidence rule applies. This means significant weight is placed on the written contract such that there is a general prohibition to read in oral terms to a written agreement. In other words, even if I were to accept the square footage of the rental unit was held out as a representation for the rental unit, it was not included into the contract as a written term such that I do not accept it could be viewed as a term to the agreement.

Within this context, the Tenants made use of the terms "material breach" and "fraudulent misrepresentation" in their oral and written arguments. Clearly, there was no material breach to the tenancy agreement since the size of the rental unit was not a term of the agreement. Further, the claim for damages, such as it is, appears to be grounded as a tort-based claim, which is to say a claim of a civil wrong giving rise to damages.

I note that I do not have jurisdiction to adjudicate a tort-based claim under the *Act*. Again, the Tenants, as claimants, must prove under s. 67 of the *Act* that the Landlord breached the *Act*, Regulations, or the tenancy agreement which caused them a loss. There is nothing in the *Act* which would otherwise give me the authority to hear or decide a tort-based claim of negligent or fraudulent misrepresentation.

I find that the Tenants have failed to demonstrate they are entitled to compensation under the *Act* for an alleged misrepresentation of the rental unit. The claim appears to be grounded in tort, an area for which I have no jurisdiction to adjudicate regardless of

whether it arises in the context of a residential tenancy. In any event, as argued before me the Tenants' claim for compensation is dismissed without leave to reapply.

2) Are the Tenants entitled to the return of their security deposit?

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address in writing, whichever is later, either repay a tenant their deposits or make a claim against the deposits with the Residential Tenancy Branch.

Under s. 38(6) of the *Act*, should a landlord fail to return the deposits or fail to file a claim within the 15-day window, or that their right to claim against the deposits has been extinguished, then they must return double the deposits to the tenant.

In this instance, I am told by the Tenants that they provided the Landlord with their forwarding address at the time of the move-out condition inspection held on July 31, 2024. The Tenants' evidence contains a copy of the condition inspection report confirming this. Upon review of the condition inspection report in the Tenants' evidence, I accept that their right to the security deposit was not extinguished under ss. 35(1) or 24(1) of the *Act*.

I am advised that the Landlord still retains the Tenants' security deposit. Upon review of their application, I find that the Landlord claimed against it by filing their application on August 15, 2024. In other words, the Landlord filed their claim within the 15-day deadline imposed by s. 38(1) of the *Act*. I note that the Landlord claimed for compensation other than damage to the rental unit, such that the question of whether their right was extinguished under ss. 24(2) or 36(2) of the *Act* is irrelevant.

Accordingly, I order that the Landlord return the security deposit, plus interest on the security deposit, in the amount of $1,411.42 ($1,397.50 + $13.92). I grant the Tenants a monetary order in this amount.

I note that I have calculated interest by use of the Residential Tenancy Branch's deposit interest calculator for the entire period the Landlord has retained the security deposit in trust for the Tenants, being from when it was paid on June 16, 2024 to the date of this decision, with the date of receipt being noted in the tenancy agreement.

3) Are the Tenants entitled to the return of their filing fee?

I find that the Tenants were largely unsuccessful, such that they are not entitled to their filing fee. Their claim under s. 72(1) of the *Act* is dismissed without leave to reapply.

Conclusion

The Landlord withdrew its claim for monetary compensation. Accordingly, I have dismissed its claim for the return of their filing fee, without leave to reapply.

I dismiss the Tenants' claim for monetary compensation under s. 67 of the *Act*, without leave to reapply.

I dismiss the Tenants' claim for their filing fee, without leave to reapply.

I grant the Tenants a monetary order for the return of their security deposit and interest, which total **$1,411.42**, to be paid by the Landlord.

It is the Tenants' obligation to serve the monetary order on the Landlord. Should the Landlord fail to comply with the monetary order, it may be enforced by the Tenants at the BC Provincial 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: October 28, 2024

Residential Tenancy Branch