DECISION

Introduction

This hearing dealt with the landlord's Application for Dispute Resolution (Application) under the *Residential Tenancy Act* (the Act) for:

- compensation for damage or loss under the Act, regulation, or tenancy agreement;
- retention of the security deposit; and
- recovery of the filing fee.

This hearing also dealt with the tenant's Application for:

- compensation for monetary loss or other money owed;
- the return of all or part of their security deposit; and
- recovery of the filing fee.

Preliminary Matters

With the consent of the parties, I amended the tenant's Application under rule 7.12 of the Residential Tenancy Branch Rules of Procedure (Rules) to separate their claims for compensation for monetary loss or other money owed from their claim for the return of their security deposit.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package) and Evidence

The agents acknowledged receipt of the tenant's Proceeding Package and documentary evidence on behalf of the landlord. They raised no service concerns. As a result, I found the landlord sufficiently served with these things for the purposes of the Act.

However, the tenant denied receipt of the landlord's Proceeding Package and evidence, stating that when they went to the post office to claim it, it had already been returned. The agents submitted an RTB-55 form and a registered mail receipt showing that the registered mail was sent on October 9, 2024. With the consent of the parties, I attempted to track the registered mail to see if there were any delays and when notice cards were left. However, I was unable to do so as I received repeated error messages of a "duplicate pin." As a result, I was unable to confirm when the registered mail was first available for pick up by the tenant, and when notice cards were left. Although

registered mail is deemed served five days after it sent under section 90(a) of the Act, deemed service is a rebuttable presumption. Given the above, I could not be satisfied that the tenant failed to receive the registered mail because of reasons beyond their control, such as a Canada Post error.

I advised the parties that for administrative fairness reasons, I would adjourn the proceeding so that the tenant could receive the landlord's Proceeding Package and evidence. However, the tenant repeatedly requested to proceed with the hearing as scheduled. I clearly advised the tenant on several occasions that if the hearing proceeded as scheduled, I would accept the landlord's application and evidence for consideration and rely on that evidence in making my decision as I was satisfied that it had been properly sent by the landlord. The tenant stated multiple times that they understood, agreed, and still wished to proceed with the hearing as scheduled without an adjournment and without receiving the landlord's Proceeding Package and evidence.

As a result of the above, and with the consent of the parties, the hearing of both Applications therefore proceeded as scheduled. I also accepted the documentary evidence before me from both parties for consideration.

Issues to be Decided

Is the landlord entitled to compensation for damage or loss under the Act, regulation, or tenancy agreement?

Is the tenant entitled to compensation for damage or loss under the Act, regulation, or tenancy agreement?

Is the landlord entitled to retain the security deposit? If not, is the tenant entitled to its return or double its amount?

Are the parties entitled to recovery of their respective filing fees?

Background and Evidence

The tenancy agreement before me states that the parties entered into a fixed term tenancy agreement for the tenant to rent the unit from October 1, 2024 - September 30, 2025, at a rate of $1,850.00 per month. It states that rent is due on the 1st day of each month and a $925.00 security deposit was paid on September 6, 2024, the same day the tenancy agreement was signed. At the hearing, the parties agreed that these are the correct terms for the tenancy agreement. They also agreed that:

- a move in condition inspection and report were properly completed on September 30, 2024;
- the tenant paid October rent;
- the tenant was given keys and possession of the rental unit;
- the tenant gave notice to end their tenancy on October 1, 2024; and

- the tenant never moved in.

The agent stated that at the move in condition inspection on September 30, 2024, the tenant mentioned that the rental unit was not clean and they therefore offered to have it cleaned. They stated that the tenant declined this offer and advised them later that day that they had found dead cockroaches in the rental unit while cleaning. The agent stated that they immediately scheduled an inspection with a pest control company, which was completed on October 3, 2024, but the tenant nevertheless gave notice on October 1, 2024, to end their tenancy that same day. They stated that no active infestation or issues were noted by the pest control company on October 3, 2024, but they again offered to have the rental unit cleaned. They stated that the tenant refused this offer, stating that they were still going to end the tenancy.

The agent stated that the liquidated damages clause in the tenancy agreement exists because they hire a company to show rental units and locate new tenants, and $1,000.00 is what the landlord is charged for these services. The agent stated that as the tenant breached their fixed term tenancy agreement by ending their tenancy early and improperly in breach of both the act and the tenancy agreement, the landlord is seeking $1,000.00 in liquidated damages. However, the agent stated that the landlord is not seeking any lost rent as the rental unit was posted for re-rental on October 4, 2024, and re-rented effective November 1, 2024.

The tenant stated that the rental unit was not clean and that when they started cleaning, they found what appeared to be mouse feces as well as dead cockroaches throughout the rental unit. They stated that although they emailed the landlord about these issues and continued cleaning for some time, they felt overwhelmed and subsequently left the rental unit. They stated that at approximately 5:30 PM they received a call from the landlord saying that what they had found was not mouse feces but that they know there is a mouse problem and the mouse is very small. They denied knowledge of any cockroach infestation and agreed to pest control. However, the tenant stated that they did not like the agent’s reaction and that they were stressed by the situation as the unit was not sanitary.

The tenant stated that they could not sleep that night and the next day they decided to give notice as they could not move in and live there. They stated that they requested that the liquidated damages clause in the tenancy agreement be waived, and argued that there is nothing in the tenancy agreement stating that the landlord can keep their security deposit for liquidated damages. The tenant therefore sought waiver of the liquidated damages clause, the return of the October 2024 rent paid, $1,000.00 for stress, pain, and suffering, plus recovery of their $100.00 filing fee.

The agent argued that the tenant should not be entitled to the recovery of October 2024 rent as the tenant improperly ended their fixed term tenancy agreement early and the landlord was unable to re-rent the rental unit until November 1, 2024, despite advertising it for r- rental on October 4, 2024.

Analysis

Section 26(1) of the act says that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with the Act, the regulations, or the tenancy agreement, unless the tenant has a right under the Act to deduct all or a portion of the rent.

Section 67 of the Act states 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.

Section 7 of the Act states that if a landlord or tenant does not comply with the Act, regulations, or their tenancy agreement, the non-complying party must compensate the other party for any damage or loss that results. It also states that the party claiming the loss must do whatever is reasonable to minimize the damage or loss.

To be awarded compensation for a breach of the Act, the party seeking compensation must prove:

1. the other party failed to comply with the Act, regulation, or tenancy agreement;
2. loss or damage resulted from this failure to comply;
3. the amount of or value of the damage or loss suffered; and
4. they acted reasonably to minimize that damage or loss.

Is the landlord entitled to compensation for damage or loss under the Act, regulation, or tenancy agreement?

The landlord sought $1,000.00 in liquidated damages. Although the tenant argued that they should not be required to pay this amount, I disagree. Under Section 1 of the tenancy agreement, it explicitly states that if the tenant ends the fixed term tenancy early without the landlord's permission, the tenant will pay the landlord $1,000.00 as liquidated damages and not as a penalty. It further states that liquidated damages are an agreed pre-estimate of the landlord's costs for re-renting the rental unit. The tenant initialed this term and signed the tenancy agreement. At the hearing, the agent stated that the amount set out for liquidated damages is the amount charged to the landlord by the agency they employ to advertise, show, and rent their rental units.

As a result of the above, I am satisfied that the amount shown in the liquidated damages clause of the tenancy agreement is a genuine pre-estimate and not a penalty. As a result, I find that it is a valid liquidated damages clause that may be enforced by the landlord. Having made this finding, I will now turn to weather the conditions for triggering the liquidated damages clause occurred.

I am satisfied by the testimony of the parties as well as the documentary evidence before me that the fixed term tenancy commenced on October 1, 2024, and was ended unilaterally by the tenant that same day or shortly thereafter. Has this tenancy

agreement had a fixed term until September 30, 2025, I therefore find that the tenant could not lawfully end their tenancy earlier than September 30, 2024, unless they complied with sections 45(3) or 45.1 of the Act in doing so. As there is no evidence that the tenancy was ended for family violence or long-term care, I therefore find that section 45.1 of the Act did not apply. I am satisfied that they did not issue a breach letter that complies with Residential Tenancy Policy Guideline 8 as required. As a result, I find that even if the landlord had breached a material term of the tenancy agreement, and the tenant had grounds to end their tenancy for breach of a material term under section 45(3) of the Act, they did not follow the proper process for doing so. As a result, I find that they improperly ended their fixed term tenancy agreement early in breach of the Act and their tenancy agreement.

I therefore find that the conditions for imposing the liquidated damages clause were triggered by the tenant and I therefore grant the landlords claim for recovery of the $1,000.00 sought for liquidated damages.

Is the tenant entitled to compensation for damage or loss under the Act, regulation, or tenancy agreement?

The tenant sought the return of the $1,850.00 that they paid in rent for October 2024. For the following reasons, I dismiss this claim without leave to reapply. I am satisfied that a fix term tenancy agreement was in place for the tenant to pay $1,850.00 in rent on the first day of each month until September 30, 2025. I am also satisfied that the tenant breached both their fixed term tenancy agreement and the Act when they ended their tenancy early, on or about October 1, 2024.

As set out in 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. As a result, I find that the tenant was bound by the terms of their tenancy agreement and the Act when they signed the tenancy agreement, although they never actually moved in.

Section 26 of the Act states that rent is due on time and in full as set out in the tenancy agreement unless the tenant has a right under the Act to deduct her withhold rent. I am not satisfied that the tenant had any of the legislatively permissible reasons to deduct or withhold rent which are as follows:

- the tenant overpaid their security deposit or pet damage deposit;
- the tenant paid for emergency repairs after carefully following the proper steps set out in section 33 of the Act;
- the tenant overpaid rent because of an illegal rent increase;
- the tenant received a two-month or four-month eviction notice for landlord’s use of property, which entitles them to one month rent as compensation, and they are applying that compensation towards the last month of their tenancy;
- the tenant has an order from the Residential Tenancy Branch (Branch) allowing them to withhold rent; or

- the landlord agreed to the rent reduction or withholding of rent.

Based on the above, I am satisfied that $1,850.00 in rent was due on or before October 1, 2024, that the tenant paid this rent as required, and that the tenant was not entitled to withhold or deduct it. I am also satisfied that the tenant unlawfully ended their fixed term tenancy agreement early. As a result, I find that the landlord did not breach the Act by failing to return the $1,850.00 to the tenant and I dismiss the tenant's claim for return of this rent without leave to reapply.

They also sought $1,000.00 in compensation for emergency expenses, pain, and suffering. However, they did not submit any documentary evidence in support of the monetary amount claimed, such as receipts, invoices, or an accounting of how they reached this amount. As a result, they failed to satisfy me of part 3 of the above noted 4-part test. Subsequently, I am not satisfied that they are entitled to the $1,000.00 in compensation sought. Nevertheless, I am satisfied by the photographs of the tenant that the rental unit was not clean at the start of the tenancy, and that there were cockroaches or cockroach carcasses, and potentially mouse feces, in the rental unit. I therefore find that the landlord breached section 32(1) of the Act by failing to provide and maintain the residential property in a state of decoration and repair that complies with health, safety, and housing standards required by law.

Based on the above, I find that the tenant is entitled to nominal damages for the landlord's breach to section 32(1) of the Act. I set these nominal damages at the small amount of $66.56, as I am satisfied that the landlord took reasonable steps to remedy this breach as soon as possible, by having the rental unit inspected by a pest control company, and offering to have the rental unit cleaned, which the tenant refused.

Is the landlord entitled to retain the security deposit? If not, is the tenant entitled to its return or double its amount?

Based on the affirmed testimony of the parties, and the documentary evidence before me, I am satisfied that this tenancy ended on or about October 1, 2024. I am also satisfied that move in and move out condition inspections were scheduled and completed in compliance with the Act and the regulations, and that the tenant provided their forwarding address in writing to the landlord on the move out condition inspection report form on October 4, 2024.

As a result of the above, I am satisfied that neither party extinguished their rights in relation to the security deposit. While I appreciate the tenant's perspective that the tenancy agreement does not explicitly permit the landlord to retain the security deposit for liquidated damages, the Act permits landlords to claim against a security deposit for a wide variety of reasons, provided they comply with section 38(1) of the Act in doing so.

Section 38(1) of the Act states that unless subsections 3 or 4 apply, a landlord must, within 15 days of the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, either:

- repay any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations; or
- make an application for dispute resolution claiming against the deposits.

As there is no evidence that subsections 3 or 4 apply, I find that they do not. The landlord filed their Application on October 8, 2024, claiming against the security deposit, and I have already found that they did not extinguish their right to do so. I have also already found that this tenancy ended on or about October 1, 2024, and that the tenant provided the landlord with their forwarding address in writing on October 4, 2024. I therefore find that the landlord complied with section 38(1) of the Act, and that the doubling provision set out under section 38(6) of the Act does not apply.

As the parties agreed that the tenant paid a $925.00 security deposit on September 6, 2024, I therefore find that the landlord currently holds $933.44 in trust as a deposit for the tenant. This includes the $925.00 originally paid plus $8.44 in interest accrued as of today's date. Pursuant to section 72(2)(b) of the Act, I therefore allow the landlord to retain the $933.44 security deposit towards the $1,000.00 owed to them by the tenant.

Are the parties entitled to recovery of their respective filing fees?

Recovery of filing fees is at my discretion. As both parties were at least partially successful in their Applications I award them both recovery of their filing fees under section 72(1) of the Act.

Conclusion

Both parties have been successful in at least part of their claims. As set out above, I award the landlord $1,100.00 for liquidated damages and recovery of their filing fee. I also award the landlord retention of the tenant’s $933.44 security deposit. This means that the tenant owes the landlord $166.56 for the difference between the total amount owed, and the total amount of the security deposit and interest retained.

However, I have also awarded the tenant $166.56 for nominal damages and recovery of their filing fee. When these amounts are set off against each other, I find that neither party is owed further compensation, as these amounts cancel each other out. No Monetary Order has been granted to either party as a result.

I believe that this decision has been rendered within 30 days after the close of the proceedings, in accordance with section 77(1)(d) of the Act and the *Interpretation Act* with regards to the calculation of time. 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 it is given after the 30-day period in subsection (1)(d). As a result, I find that neither the validity of this decision, nor my authority to render it, are affected if I

have erred in my calculation of time and 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 Branch under section 9.1(1) of the Act.

Dated: January 19, 2024

Residential Tenancy Branch