



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC

Introduction

This hearing dealt with the Landlord's Application for Dispute Resolution for an Order for money owed or compensation for damage or loss under the Residential Tenancy Act (the "Act"), regulation or tenancy agreement and an Order to keep all or part of the pet damage deposit or security deposit.

The parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in documentary form, and make submissions to me.

Preliminary Issue:

In support of his application, the Landlord submitted no evidence.

The Landlord did submit evidence in response to the Tenant's evidence, which I find was timely submitted, but the Landlord's responsive evidence was submitted less than five business days prior to the hearing and the Tenant testified that he had not yet received the evidence.

The Residential Tenancy Branch Rules of Procedure 3.5 requires copies of any documents, that were not available to be filed with the application, but which the applicant, the Landlord in this case, intends to rely upon as evidence at the dispute resolution proceeding, must be received by the Residential Tenancy Branch and must be served on the respondent, the Tenant in this case, as soon as possible, and at least (5) days before the dispute resolution proceeding as those days are defined in the "Definitions" part of the Rules of Procedure.

Rule 11.5 states that the Dispute Resolution Officer may refuse to accept the evidence if the Dispute Resolution Officer determines that there has been a wilful or recurring failure to comply with the Act or the Rules of Procedure, or, if for some other reason, the acceptance of the evidence would prejudice the other party, or result in a breach of the principles of natural justice.

In this case, I considered that most of the evidence submitted by the Landlord was available to him at the time of his application. The written response to the Tenant's evidence was received by the Landlord in time to make a timely submission of evidence. I therefore decline to consider the Landlord's evidence for purposes of this Decision.

Issue(s) to be Decided

Has the Tenant breached the Act or tenancy agreement, entitling the Landlord to an Order for monetary relief and to retain the Tenant's security deposit?

Background and Evidence

This one year, fixed term tenancy began on January 1, 2011, and ended on May 31, 2011, when the Tenant vacated the rental unit. Monthly rent was \$550.00 and the Tenant paid a security deposit of \$275.00 on December 27, 2010.

The Landlord has not returned any of the security deposit.

The Landlord's claim is in the amount of \$275.00 for liquidated damages. The Landlord also claims the amount of \$50.00 for recovery of the filing fee, even though he has not paid a filing fee for his application.

In support of his application, the Landlord submitted that he was entitled to retain the Tenant's security deposit as liquidated damages due to the Tenant breaking the 1 year, fixed term tenancy agreement, as the tenancy was set to end on December 31, 2011.

The Landlord stated that he received the Tenant's written notification on April 27, 2011, that he was vacating the rental unit on May 31, 2011.

The Landlord stated that he immediately took steps to re-rent the rental unit and that he was successful in re-renting the rental unit for July 1, 2011.

In response, the Tenant stated that he was compelled to end the tenancy early due to the Landlord's breach of several material terms of the tenancy agreement, particularly as it related to fixing the hole in the wall, removal of blinds and window covering, lack of reliable internet service and failure to provide a rental unit complying with health and safety standards.

The Tenant stated that the Landlord never fixed any of the problems, as the Landlord either did not have enough money or time or needed to help with his church.

The Tenant submitted a significant amount of evidence in support of his defence of the Landlord's application, including a copy of the tenancy agreement, emails between the Tenant and Landlord in which he made numerous requests to the Landlord to address the problems, the notice to end tenancy and photos of the problem areas of which he complained.

Analysis

Based on the above testimony and evidence, and on a balance of probabilities, I find as follows:

When making a claim for damages under a tenancy agreement or the *Act*, the party, the Landlord in this case, making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or *Act*, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Residential Tenancy Branch Policy Guideline #4 (Liquidated Damages) states that in order to be enforceable, a liquidated damages clause in a tenancy agreement (clause 1 of the addendum in this case) must be a genuine pre-estimate of 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.

In this case, the Landlord has not claimed that the liquidated damages were a genuine pre-estimate or were intended to compensate him for his time and expense in re-renting the rental unit as a result of the early end to tenancy by the Tenant.

Further the Landlord has not submitted any proof of actual damage or loss suffered in re-renting the rental unit, as the testimony indicated the advertising was through free sources.

Therefore I find the liquidated damages clause in this tenancy agreement to be a penalty and unenforceable.

Additionally, the Landlord submitted insufficient evidence to substantiate that he lost rental income for the month of June 2011, which is his requirement in step 4 of his burden of proof.

As the Landlord submitted insufficient evidence in support of his application for damage or loss, I therefore decline to consider that the Landlord may still claim this amount as an upper limit on any damage award.

Due to the above, I **dismiss** the Landlord's claim for \$275.00 in liquidated damages, **without leave to reapply**.

I also **dismiss** the Landlord's claim for recovery of the filing fee as he did not pay a filing fee.

As I have dismissed the Landlord's application, I **direct** the Landlord to return to the Tenant his security deposit in the amount of \$275.00.

Under authority of section 67 of the *Act*, I **grant** the Tenant a monetary order for the amount of **\$275.00**.

I am enclosing a monetary order for \$275.00 with the Tenant's Decision. This order is a **legally binding, final order**, and it may be filed in the Provincial Court of British Columbia (Small Claims) should the Landlord fail to comply with this monetary order.

Conclusion

The Landlord's application is dismissed, without leave to reapply.

The Tenant is granted a monetary order in the amount of \$275.00.

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 09, 2011.

Residential Tenancy Branch