



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the Tenant: MNSD
For the Landlord: MNDC, FF

Introduction

This hearing dealt with Cross Applications for Dispute Resolution.

The tenant applied for a monetary order for a return of her security deposit.

The landlord applied for a monetary order for money owed or compensation for damage or loss under the Residential Tenancy Act (the "Act") or tenancy agreement and to recover the filing fee for the Application.

Despite having her own application set for this day, and having been served a Notice of the landlord's application and Notice of Hearing via registered mail on October 5, 2011, the tenant failed to appear for the telephone conference call hearing. Thus the hearing proceeded in the tenant's absence.

The landlord's agent appeared, gave affirmed testimony and was provided the opportunity to present his evidence orally and in documentary form prior to the hearing, and to make submissions to me.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss under the Act or tenancy agreement pursuant to sections 67 and 72 of the Act?

Is the tenant entitled to a monetary order for a return of her security deposit, doubled?

Background and Evidence

The fixed term tenancy started on August 1, 2010, was to end on July 31, 2011, but actually ended on May 26, 2011, when the tenants vacated the rental unit early, monthly

rent was \$3,000.00 and the tenants paid a security deposit of \$1,500.00 on July 16, 2010.

The landlord's monetary claim is in the amount of \$1,680.00, comprised of costs incurred by the landlord to re-lease the property.

The landlord's agent testified that the tenant and her husband entered into the tenancy agreement, which pursuant to one of the terms contained therein, provided that in the event the tenants ended the tenancy early, the tenants would be responsible to continue paying rent until the end of the fixed term, or if the landlord agrees that the tenant may terminate the tenancy and is able to mitigate his loss by re-renting, will be responsible for costs of mitigation of re-renting. That clause ended by stating "This is not a penalty."

Upon query, the landlord's agent stated that this clause was intended as a liquidated damages clause.

The evidence and testimony indicates that the tenants gave notice on April 19, 2011, of their intent to vacate the rental unit as of May 31, 2011, due to personal problems.

Thereafter, according to the landlord's agent, the agent undertook steps to re-rent the rental unit and found a new tenant, who took occupancy on May 27, 2011, after the tenants left earlier than the original notice, as per the agreement of the parties.

The evidence and testimony indicates that the landlord's agent informed the parties, of the landlord's intention to enforce the liquidated damage clause, which in this case, according to the landlord's agent, was his cost assessed to the landlord for his property management fees of a half month's rent, or \$1,500.00.

The landlord's agent contends that due to this clause, the tenants owe the landlord the amount of \$1,500.00, which the landlord has retained by way of the tenants' security deposit, and that the tenant owes the balance of \$180.00 as HST charged for that fee.

The landlord's agent stated that he agreed that the tenants were entitled to receive the amount of \$483.87, as a refund for the prorated rent for May and that a cheque in this amount is on file at the landlord's agent's office.

Additionally, the landlord's agent contends that he was aware that he was required to return the tenants' security deposit within 15 days of receiving the tenants' forwarding address or the end of the tenancy and therefore showed evidence that a cheque in that amount of \$1,500.00 to the tenants was on file at the landlord's agent's office.

I note that despite this contention, an email from the landlord's agent on June 7, 2011, to the tenant showed that the tenant owed the further amount of \$180.00, not \$1,680.00.

Upon query, the landlord's agent agreed he received the tenant's forwarding address on May 27, 2011.

Upon query the landlord's agent stated that the two cheques for \$1,500.00 and \$483.87 were still on file in his office and have not been delivered to the tenant due to the mail strike in June; however he has made them available for the tenant to pick-up and that she has failed to do so, according to the landlord's agent.

Analysis

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

I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence **relevant** to the issues and findings in this matter are described in this Decision.

In a claim for damage or loss under the Act or tenancy agreement, the claiming party has to prove four different elements:

First, proof that the damage or loss exists, **secondly**, that the damage or loss occurred due to the actions or neglect of the Respondent in violation of the Act or agreement, **thirdly**, to establish the actual amount required to compensate for the claimed loss or to repair the damage, and **lastly**, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed. In this case, the onus is on both parties to prove damage or loss.

Where the claiming party has not met all four elements, the burden of proof has not been met and the claim fails.

Landlord's Application:

As to the landlord's claim for a monetary order of \$1,680.00 representing the tenants' agreement to pay liquidated damage, Residential Tenancy Branch Policy Guideline 4 states that 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.

I find that the liquidated damages clause in the tenancy agreement is not enforceable as there is no specific amount listed, there was no genuine pre-estimate, and the tenants had no way of knowing what amount was agreed to. I therefore **dismiss** the landlord's monetary claim for \$1,680.00, without leave to reapply.

Had I not dismissed the landlord's claim for liquidated damages due to the clause as written is unenforceable, I would still have dismissed the landlord's monetary claim for his property manager's fee as the dispute resolution process allows an Applicant to claim for compensation or loss as the result of a breach of Act and not for costs incurred to conduct a landlord's business.

As to the tenant's security deposit, the landlord's agent's confirmation supports that the tenant provided the landlord with her written forwarding address on May 27, 2011. Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, in this case May 26, 2011, and 2) the date the landlord receives the tenant's forwarding address, in this case, May 27, 2011, the landlord must repay the security deposit, to the tenant with interest or make application for dispute resolution claiming against the security deposit. [Emphasis added]

The failure to comply with this section entitles the tenant to receive double her security deposit.

The landlord has not applied for dispute resolution to keep all or part of the security or pet damage deposit, as the landlord's application pertained solely to their request for a monetary order for money owed or compensation for damage or loss under the Act or tenancy agreement and recovery of the filing fee.

I find the act of making a cheque available to the tenant and not delivering the same to the tenant fails to comply with the Act, although I find the date of the cheque June 13, 2011, further fails to comply with the Act.

I also find the landlord does not have the tenant's written consent to retain her security deposit.

As I have dismissed the landlord's application, I find that the tenant is entitled to a monetary order for a return of her security deposit, doubled.

Pursuant to section 67 of the Act, I therefore grant the tenant a **monetary order** in the amount of **\$3,000.00**, comprised of her security deposit, doubled.

I am enclosing a monetary order for \$3,000.00 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) for enforcement should the landlord fail to comply with this monetary order.

Tenant's Application:

As the issue of the tenant's security deposit was dealt with in the landlord's application, consideration of the tenant's application became redundant. I therefore make no findings on the tenant's application.

Conclusion

The tenant is granted a monetary order of \$3,000.00.

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

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: November 02, 2011.

Residential Tenancy Branch