



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes For the landlord: MNSD
For the tenant: MNSD, FF

Introduction

This hearing dealt with the cross applications of the parties for dispute resolution, seeking remedy under the Residential Tenancy Act (the "Act").

The landlord applied for authority to retain the tenant's security deposit and pet damage deposit.

The tenant applied for a return of her security deposit and pet damage deposit, and for recovery of the filing fee.

The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties gave affirmed testimony, were provided the opportunity to present their evidence orally and in documentary form prior to the hearing, and make submissions to me.

Preliminary Issue-

The tenant's legal counsel stated that he had submitted evidence for the hearing; however, at the time of the hearing, the evidence was not in the file. The landlord's agents acknowledged having received a copy of the tenant's evidence. I therefore allowed the legal counsel to fax in the evidence after the hearing; however, I note that by the time the hearing had concluded, the evidence of the tenant was located.

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.

Issue(s) to be Decided

Is the landlord entitled to retain the tenant's security deposit and pet damage deposit, in satisfaction of a monetary claim?

Is the tenant entitled to a return of her security deposit and pet damage deposit and to recover the filing fee?

Background and Evidence

This one year, fixed term tenancy began on January 30, 2011, was set to end on January 31, 2012, actually ended on December 31, 2011, when the tenant vacated the rental unit, monthly rent was \$1215.00 and the tenant paid a security deposit of \$607.50 and a pet damage deposit of \$607.50 on or about January 7, 2011.

Landlord's application-

The landlord's monetary claim is in the amount of \$857.50, which includes liquidated damages of \$607.50, \$200.00 for repair/paint of walls and the filing fee of \$50.00.

In support of their application, the landlord's agent submitted that the tenant ended the tenancy a month before the end of the fixed term and therefore was responsible for the payment of liquidated damages of \$607.50 due to the clause in the tenancy agreement, which was supplied into evidence. The clause provided that the tenant would be responsible for the liquidated damages in the event she ended the tenancy before the fixed term. The referenced clause was initialled by the tenant.

The landlord also claimed that the tenant damaged the walls with nail holes, which required repair and painting. The landlord pointed to the condition inspection report submitted into evidence of the listing of the alleged damage.

The landlord submitted that the tenant did attend the move-out inspection and received a copy of the report.

The landlord's agent explained that the landlord retained the tenant's security deposit of \$607.50 in satisfaction of the liquidated damages amount, then subtracted \$250.00 for alleged damage to the walls and the filing fee from the tenant's pet damage deposit, and returned to the tenant the balance of \$357.50.

The landlord's agent confirmed that there was no damage by the tenant's pet.

When questioned, the landlord's agent explained that the landlord lists a liquidated damages clause in their tenancy agreement as it is the landlord's policy not to seek unpaid rent as a result of a breach of a fixed term. The landlord's agent further submitted that the liquidated damages also covers costs such as re-renting, which may require extra employees and paperwork.

As to the matter of the alleged excessive nail holes, the landlord's agent admitted in cross examination that the tenant attempted to repair the holes, but that she was asked to stop.

In cross examination, the landlord's agent responded that a leasing agent was present when the tenant signed the tenancy agreement, not the attending landlord's agents. The landlord's agent also admitted that the landlord made no attempt to find a

subtenant as the tenant requested, as there was just one month remaining on the fixed term.

Tenant's application-

The tenant's monetary claim is in the amount of \$857.50, which is a return of her security deposit of \$607.50, the balance of her pet damage deposit in the amount of \$250.00, and the filing fee of \$50.00.

The tenant denied owing liquidated damages to the landlord due to the clause not being explained during the process of signing the tenancy agreement and the landlord not agreeing to a sub tenancy.

The tenant also submitted that she gave the landlord six weeks' notice that she was terminating the lease one month early, and that the landlord's only response was that she would be responsible for the "liquidation" damages. Further the tenant stated that she consulted a lawyer, who contacted the landlord's agent, with no success. The tenant then considered that the issue of the liquidated damages was closed and she would not be charged.

The tenant submitted that at the move-out inspection, the landlord's agent informed her they were retaining the amount of \$857.50 from her deposits, to which the tenant did not agree. The tenant denied damaging the walls, and stated that she received permission from the landlord's agent to put up nine shelves in the rental unit.

The tenant further submitted that the landlord's agent asked her to remove the shelves and not fill in the holes, as that would be considered normal wear and tear.

The tenant's legal counsel argued that the liquidated damages clause in the tenancy agreement amounted to a penalty, as the automatic forfeiture coincided with the amount of the security deposit.

The tenant's legal counsel also argued that the landlord should be assessed administrative penalties as the tenant's pet damage deposit was never returned despite numerous requests and as there was no pet damage.

Analysis

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

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.

Landlord's application:

Liquidated damages-

Residential Tenancy Branch Policy Guideline #4 (Liquidated Damages) states that in order to be enforceable, a liquidated damages clause in a tenancy agreement 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 contended that the liquidated damages clause was inserted in the tenancy agreement and used due to the landlord's policy of not seeking unpaid rent as the result of a tenant's breach of a fixed term. The landlord's agents also submitted that extra costs involved could include hiring extra agents to market or show the rental unit, which may have not been in the budget for that month.

After careful review and consideration, I am not convinced that the amount listed in the liquidated damages clause was a genuine pre-estimate of costs or loss. Rather, in this case, I accept the argument of the tenant's counsel and I find the clause acts an automatic forfeiture of a tenant's security deposit, which is not allowed under the Act.

I also find that the landlord failed to submit convincing evidence that the liquidated damages were a genuine pre-estimate or were intended to compensate them for time and expense in re-renting the rental unit as a result of the early end to tenancy by the tenant.

Therefore I find the liquidated damages clause in this tenancy agreement to be a penalty and unenforceable and I dismiss the landlord's monetary claim for \$607.50, without leave to reapply.

Repair and painting-

Residential Tenancy Branch Regulation # 20 provides requirements which must be contained in a condition inspection report, including the tenant's correct legal name, the address of the rental unit, signatures of the parties and a statement of the condition of the rental unit.

In reviewing the Condition Inspection Report submitted by the landlord, I find the condition inspection report to be deficient for purposes of compliance with the Act and Regulation for failure to provide the requirements listed above. I additionally find that the landlord failed to list on the move-out inspection a room by room statement of

condition and failed to supply any evidence that the walls required repair and painting or costs of any alleged repair.

I therefore find that the landlord submitted insufficient evidence of damage by the tenant, and I therefore dismiss their monetary claim of \$200.00, without leave to reapply.

As I have dismissed the landlord's monetary claim, I dismiss their request to recover the filing fee.

Tenant's application-

As I have dismissed the landlord claim for liquidated damages, I find that the tenant is entitled to a return of her security deposit of \$607.50.

Section 38(1) of the *Act* requires a landlord to either return a tenant's security deposit or pet damage deposit or to file an application for dispute resolution to retain the deposits within 15 days of receiving the tenant's forwarding address in writing. Section 38(6) of the *Act* states that if a landlord fails to comply, or follow the requirements of section 38(1), then the landlord must pay the tenant double the security deposit.

Section 38(7) of the *Act* stipulates that a landlord may only claim against the tenant's pet damage deposit for damages caused by the pet. In this case, the landlord confirmed that there was no damage by the tenant's pet, yet they withheld the amount of \$250.00 from the tenant's pet damage deposit for their claim for \$200.00 for alleged nail hole damage and the filing fee for dispute resolution and returned the balance.

The landlord did apply for dispute resolution within 15 days claiming against the security deposit for liquidated damages, which I find brings them into compliance with the *Act*; however I find the landlord did not have a right to make an application claiming against the pet damage deposit for alleged damages caused by the tenant or to recover the filing fee.

As the landlord failed to return the tenant's pet damage deposit in accordance with section 38, having no right to make an application for non-pet related damage, the tenant is entitled to a return of her pet damage deposit of \$607.50, doubled, or \$1215.00, less the amount of \$357.50 previously returned by the landlord, for a total amount of \$857.50.

As I have found merit with the tenant's application, I award her recovery of the filing fee of \$50.00.

I find the tenant has established a total **monetary claim** of **\$1515.00**, comprised of a return of her security deposit of \$607.50, double her pet damage deposit of \$607.50, or \$1215.00, less \$357.50 returned by the landlord, and her filing fee of \$50.00.

Conclusion

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

The tenant has established a monetary claim of \$1515.00 and I have issued her a monetary order for that amount.

I am enclosing the monetary order for **\$1515.00 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.

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: April 04, 2012.

Residential Tenancy Branch