



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNDC, FF

Introduction

This hearing dealt with the landlord's application for dispute resolution under the Residential Tenancy Act (the "Act"), seeking a monetary order for unpaid rent and money owed or compensation for damage or loss 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.

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.

Preliminary Issue 1:

The landlord confirmed that he did not serve the female tenant with a Notice of Hearing and hearing package as he did not know her address; as a result, I have excluded from consideration the landlord's request for a monetary order against the female tenant as she was not served in a manner complying with section 89 of the Act.

Preliminary Issue 2:

The landlord's application contained a monetary claim of \$1300.00. However, the landlord submitted additional evidence on April 16, 2012, which was also sent to the tenant, which included a request for an additional amount, increasing his monetary claim to \$2125.00. I accept that the tenant was made aware of the landlord's increased request and have allowed his request to amend the amount of his monetary claim.

Issue(s) to be Decided

Is the landlord entitled to a monetary order and to recover the filing fee?

Background and Evidence

The landlord submitted that on February 11, 2012, the tenants entered into a fixed term tenancy agreement, beginning March 1, 2012, which was set to end on March 31, 2013. Monthly rent was set at \$950.00.

The landlord further submitted that the tenants never moved in, having given notice to him on February 19, 2012, that they would not be moving in, after having paid a down payment of rent in the amount of \$450.00.

The landlord submitted that he began advertising the rental unit the next day, but was unable to find a new tenant for March 1, 2012. The landlord further contended that he made all attempts to find a new tenant, including reducing the monthly rent.

Due to the tenants' insufficient Notice, the landlord stated he was entitled to loss of revenue for March 2012.

Additionally, the landlord submitted that he was unable to re-rent the rental unit for the original rent, but was compelled to accept a reduced monthly rent of \$875.00, in order to mitigate his loss. The landlord contended that he was entitled to the difference in rent.

The landlord also stated that he was entitled to receive the liquidated damages as agreed upon in the tenancy agreement, in the amount of \$800.00. The landlord stated that this payment was intended to compensate the landlord for expenses in re-renting the rental unit prior to the end of the fixed term.

When queried, the landlord submitted that he advertises the rental unit using the local paper. The landlord also stated that he was the one who attended to showing the rental unit and placing the advertisements.

The landlord's monetary claim is in the amount of \$2125.00, which includes retention of the down payment of rent of \$450.00, with a request for the balance of \$500.00 for March 2012, the liquidated damages of \$800.00, and \$825.00 for loss of rent difference of \$75.00 per month from April 2012 through February 2013.

The landlord's relevant evidence included the tenancy agreement, notice by the tenant of early termination, and evidence of advertisements of the rental unit.

Analysis

Based on the testimony, evidence, and 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 the landlord 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.

Section 45 (2) of the Residential Tenancy Act requires a tenant to give notice to end the tenancy that is, among other things, not earlier than the date specified in the tenancy agreement as the end of the tenancy, in this case the end of the fixed term being March 31, 2013.

I find the landlord and the tenant entered into a valid, enforceable tenancy agreement. Therefore the tenant was responsible for paying rent, beginning March 2012, according to the terms of the agreement, whether he moved in or not, and that he failed to do so. I therefore find that the landlord has established a monetary claim for loss of revenue of \$500.00 for unpaid rent for March 2012 as I allow the landlord to retain the previously paid amount of \$450.00.

Residential Tenancy Policy Guideline #3 states that, as to damages, a landlord may be compensated for the difference between what he/she would have received from the defaulting tenant and what he/she was able to re-rent the premises for the balance of the un-expired term of the tenancy.

I find the landlord submitted sufficient testimony and documentary evidence that he mitigated his loss by immediately advertising the rental unit and was unable to find a suitable tenant at the former rent of \$950.00. I therefore find the landlord has established his claim for loss of rent revenue for the balance of the tenancy agreement in the amount of \$825.00 (\$75.00 for 11 months, April 2012 through February 2013).

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 was not able to explain how the liquidated damages were a genuine pre-estimate on the day the tenancy agreement was signed 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.

The landlord submitted some proof of expenses related to advertising, but this amount was clearly well below the amount claimed as liquidated damages. Further the landlord could not account for his own time and how that would cause him to incur expenses.

Therefore I find the liquidated damages clause in this tenancy agreement to be a penalty and unenforceable and I dismiss his claim for \$800.00.

Conclusion

I find that the landlord has established a monetary claim of \$1375.00, comprised of loss of rent revenue for March 2012, in the amount of \$500.00, loss of rent difference for the balance of the fixed term in the amount of \$825.00 and the filing fee of \$50.00.

I grant the landlord a monetary order for \$1375.00 and enclose the monetary order with the landlord'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 tenant 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: May 14, 2012.

Residential Tenancy Branch