



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: OPB, MND, MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's application for a order of possession / a monetary order as compensation for damage to the unit, site or property / compensation for damage or loss under the Act, Regulation or tenancy agreement / retention of the security deposit / and recovery of the filing fee. The landlord participated in the hearing and gave affirmed testimony. Despite service of the application for dispute resolution and notice of hearing (the "hearing package") by way of registered mail, the tenants did not appear. Evidence submitted by the landlord includes the Canada Post tracking number for the registered mail.

As the tenants have vacated the unit, during the hearing the landlord withdrew the application for an order of possession.

Issue(s) to be Decided

Whether the landlord is entitled to any of the above under the Act, Regulation or tenancy agreement.

Background and Evidence

Pursuant to a written tenancy agreement, the fixed term of tenancy is from December 15, 2011 to December 31, 2013. Monthly rent of \$2,650.00 is due and payable in advance on the first day of each month, and a security deposit of \$1,325.00 was collected. The landlord testified that a move-in condition inspection report was completed with the participation of both parties, however, there is no copy of the report in evidence before me.

The parties entered into an agreement to end tenancy by way of a "Mutual Agreement to End a Tenancy" form (# RTB – 8). The date when the form was signed is not documented, however, the landlord testified that it was completed on May 30, 2012. Further, the date when the parties agree that tenancy will end is documented as May 30, 2013. The landlord testified that this was an administrative error and the date

should read May 30, 2012. The landlord testified that a move-out condition inspection report was completed, but that the tenants declined to sign it as they appeared to be in a rush to leave the unit. A copy of this report is not in evidence. Further, the landlord testified that the tenants verbally instructed him to use the address of the male tenant's mother as their forwarding address; that address was provided by the tenants on the "Application to Rent Form."

By way of an "Addendum" to the "Mutual Agreement to End a Tenancy" form, the parties agreed to certain terms further to an end date to the tenancy. These included, but were not limited to, the following:

- that the landlord will retain the security deposit of \$1,325.00 as "liquidated damages;"
- that the tenants will pay the landlord a further fee of \$662.50 "to release the property."

Additional compensation sought by the landlord in his application includes the following:

- \$4.99: pay per view / video on demand
- \$5.44: long distance telephone call
- \$35.83: replacement of broken shower rod
- \$325.00: painting
- \$50.00: filing fee

Evidence includes, but is not limited to, some receipts and photographs.

Analysis

The full text of the Act, Regulation, Residential Tenancy Policy Guidelines, Fact Sheets, forms and more can be accessed via the website: www.rto.gov.bc.ca

Based on the documentary evidence and the landlord's affirmed / undisputed testimony, the various aspects of the landlord's claim and my findings around each are set out below.

\$1,325.00 (“liquidated damages”) & \$662.50* (“release” fee).

Residential Tenancy Policy Guideline # 4 addresses “Liquidated Damages,” in part, as follows:

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. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

There is no evidence that the above amounts were discussed between the parties at the time when the tenancy was entered into. Further, the amounts are not addressed in the tenancy agreement in relation to a pre-estimate of loss in the event of an early end of tenancy. Rather, the disposition of the security deposit as “liquidated damages,” and the introduction of a “release” fee were addressed between the parties at the time when tenancy was about to end.

Following from all of the above, I find that the agreement to forfeit the security deposit as a result of the early end of tenancy is a penalty clause and, therefore, unenforceable. However, I find that the so-called “release” fee is more in keeping with a liquidated damages clause, as is the quantum, and I find that the landlord has therefore established entitlement to this amount.

\$4.99*: pay per view / video on demand. I find that the landlord has established entitlement to the full amount claimed.

\$5.44*: long distance telephone call. I find that the landlord has established entitlement to the full amount claimed.

\$35.83*: replacement of broken shower rod. I find that the landlord has established entitlement to the full amount claimed.

\$325.00: painting. In the combined absence of a receipt, a log of time spent painting or the comparative results of a move-in and move-out condition inspection report in evidence, this aspect of the application is hereby dismissed.

\$50.00*: *filing fee*. As the landlord has achieved a measure of success with his application, I find that he has established entitlement to recovery of the full filing fee.

Total entitlement: **\$758.76**

Conclusion

Following from the above, I order that the landlord retain **\$758.76** from the security deposit of **\$1,325.00**, and I order the landlord to repay the balance to the tenants in the amount of **\$566.24** (\$1,325.00 - \$758.76).

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: August 20, 2012.

Residential Tenancy Branch