



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

### Dispute Codes:

CNR, MNDC, MNR, MNSD, FF

### Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss; for a monetary Order for unpaid rent; to keep all or part of the security/pet damage deposit; and to recover the fee for filing this Application for Dispute Resolution.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied to set aside a notice to end tenancy; to recover the security/pet damage deposit; and to recover the fee for filing this Application for Dispute Resolution. At the hearing the Tenant withdrew the application to cancel a notice to end tenancy, as they do not wish to occupy the rental unit.

The Landlord submitted documents to the Residential Tenancy Branch, copies of which were served to the Tenant. The Tenant acknowledged receipt of the Landlord's evidence and it was accepted as evidence for these proceedings. The Tenant submitted documents to the Residential Tenancy Branch, copies of which were served to the Landlord. The Landlord acknowledged receipt of the Tenant's evidence and it was accepted as evidence for these proceedings.

### Issues

Is the Landlord is entitled to compensation for unpaid rent/loss of revenue; should the security deposit be retained by the Landlord or returned to the Tenant; and is either party entitled to recover the fee for filing an Application for Dispute Resolution?

### Background and Evidence

The Landlord and the Tenant agree that on December 05, 2012 they entered into a written tenancy agreement, a copy of which was submitted as evidence. The agreement indicates that the tenancy begins on January 01, 2013; that the tenancy is for a fixed term that ends on December 31, 2013; that the Tenant must vacate the rental

unit at the end of the fixed term, unless a new lease is signed; that the Tenant is obligated to pay monthly rent of \$2,800.00 by the first day of each month; and that compensation that is the equivalent of one and half month's rent must be paid if the lease is terminated prematurely.

The Landlord and the Tenant agree that a \$1,400.00 security deposit was paid and a \$1,400.00 pet damage deposit was paid.

The Tenant stated that after speaking with a former tenant of this rental unit, they became concerned that there may be mould in the rental unit. The Landlord and the Tenant agree that on December 08, 2012 the Tenants expressed this concern to the Landlord. The Landlord stated that on December 09, 2012 he told the Tenant he would not have the rental unit inspected for mould, as he had been advised that no professional could "guarantee" a building did not have mould.

The Landlord stated that he does not believe there is a problem with mould in the rental unit. He stated that former tenants did express concern about mould in one of the bathrooms, which he determined was related to improper use of a bathroom fan.

The Tenant stated that they offered to have the unit inspected at their own expense and the Landlord told them they could not have the unit inspected. The Tenant stated that the unit was not inspected and there is no documentary evidence of mould in the rental unit.

The Landlord stated that on December 09, 2012 the Tenant told him they would not move into the rental unit; that on December 10, 2012 they told him they would move into the rental unit; and that on December 12, 2012 he offered to refund \$1,200.00 to the Tenant if they wished to end the tenancy; and that the Tenant declined the offer of a partial refund.

The Tenant stated that they did not inform the Landlord that they were not moving into the rental unit until they provided him with a letter from their legal counsel, dated December 13, 2012. In the letter, which was submitted as evidence, the Tenant outlines a variety of concerns and requests a full refund of the \$2,800.00 deposit that was paid. The letter does not explicitly end the tenancy, although it is reasonably clear that the Tenant does not intend to move into the rental unit. The Landlord acknowledged receiving the letter dated December 13, 2012.

The Landlord and the Tenant agree that the Landlord advertised the rental unit on a popular website on December 08, 2012 and December 11, 2012. The Landlord stated that he advertised the rental unit to mitigate his potential losses if the Tenant did not move into the rental unit; that he would have ensured the Tenant did not wish to continue with the tenancy before he entered into a tenancy agreement with another person; and that he was able to enter into a new tenancy for February 15, 2013. The Tenant stated that when he saw the rental unit advertised on December 08, 2012, he assumed the Landlord was not continuing with the tenancy.

The Landlord and the Tenant agree that the Landlord personally served a Ten Day Notice to End Tenancy for Unpaid Rent to the female Tenant on January 02, 2013, after rent was not paid on January 01, 2013.

### Analysis

On the basis of the undisputed evidence, I find that the Landlord and the Tenant entered into a fixed term tenancy agreement that was to begin on January 01, 2013, for which the Tenant was obligated to pay rent of \$2,800.00 by the first day of each month.

Section 44(1)(a) of the *Residential Tenancy Act (Act)* stipulates that a tenancy ends if the tenant or landlord gives notice to end the tenancy in accordance with section 45, 46, 47, 48, 49, 49.1, and 50 of the *Act*. I note that the Tenant did not have the right to end this tenancy with written notice, pursuant to section 45 of the *Act*, until the fixed term of the tenancy agreement had expired on December 31, 2013.

The evidence shows that the Tenant did not pay rent when it was due on January 01, 2013 and that the Landlord served the Tenant with a Ten Day Notice to End Tenancy on January 02, 2013, which declared that the tenancy would end on January 12, 2013. As the Landlord had the right to end the tenancy for unpaid rent, pursuant to section 46 of the *Act*, I find that the Notice to End Tenancy served to end the tenancy on January 12, 2013.

Section 26 of the *Act* requires a tenant to pay rent when rent is due, whether or not the Landlord complies with the *Act*. As the Tenant did not pay the rent that was due on January 01, 2013 and the tenancy had not been ended by that date, I find that the Tenant must pay the Landlord \$2,800.00 in rent for January of 2013.

I find that the Tenant fundamentally breached the tenancy agreement when they did not pay rent when it was due, which resulted in this tenancy ending prior to the end of the fixed term of the tenancy. I find that the non-payment of rent resulted in the Landlord losing revenue of \$1,400.00 for the first two weeks of February of 2013, which the Landlord would not have lost if the Tenant had paid rent when it was due. I therefore find that the Landlord is entitled to compensation for lost revenue of \$1,400.00 for the period between February 01, 2013 and February 14, 2013.

In reaching this conclusion, I was influenced by the undisputed evidence that the Landlord was advertising the rental unit in December of 2012. In my view, this establishes that the Landlord was making an effort to mitigate his potential loss, as is required by section 7(2) of the *Act*. While the Tenant may have interpreted the advertisements to mean that the Landlord was ending the tenancy, the Landlord did not have the right to enter into a new tenancy agreement with another person until this tenancy agreement was ended in accordance with the *Act*.

In determining this matter, I note that there is no documentary evidence to support the Tenant's concern that there is mould in the rental unit. In my view, the Tenant has

failed to establish that the rental unit did not comply with health, safety, and housing standards. In these circumstances, where the Tenant's concerns are based on information provided to them by a third party, I find that the Tenant should have paid rent when it was due; had the rental unit inspected by a qualified professional, regardless of the wishes of the Landlord; and sought an appropriate remedy if it was determined there was mould in the rental unit.

A tenancy agreement can include a "liquidated damages" clause, which is a clause where the parties agree, in advance, to the amount that will be paid in the event of a breach of the tenancy agreement. Residential Branch Policy Guidelines suggest that an 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 will be unenforceable. I find that the clause in the tenancy agreement which declares that the tenant must pay \$4,200.00 if they end the tenancy prematurely is not enforceable. I find that this amount far exceeds the anticipated costs of re-renting the unit and I therefore find that it is a "penalty". I therefore find that the Landlord is not entitled to collect liquidated damages as a result of this tenancy ending.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the filing fee from the Tenant for the cost of this Application for Dispute Resolution. I find that the Tenant's application is without merit and I dismiss the Tenant's application to recover the filing fee.

### Conclusion

The Landlord has established a monetary claim, in the amount of \$4,250.00, which is comprised of \$4,200.00 in unpaid rent and \$50.00 in compensation for the filing fee paid by the Landlord for this Application for Dispute Resolution. I authorize the Landlord to retain the Tenant's security deposit and pet damage deposit, pursuant to section 72(2) of the Act, in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the amount \$1,450.00. In the event that the Tenant does not comply with this Order, it may be served on the Tenant, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

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 02, 2013

