



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Key Marketing Inc.
and [tenant name suppressed to protect privacy]

DECISION

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

Introduction

This hearing was convened as a result of the cross applications of the parties for dispute resolution under the Residential Tenancy Act (the “Act”).

The landlord applied for authority to retain the tenant’s security deposit, a monetary order for money owed or compensation for damage or loss, and for recovery of the filing fee.

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

Both parties attended the telephone conference call hearing. The hearing process was explained to the parties and an opportunity was given to ask questions about the hearing process. Thereafter the parties were provided the opportunity to present their evidence orally, refer to documentary evidence submitted prior to the hearing, make submissions to me, and respond to the other’s evidence.

At the outset of the hearing, neither party raised any issues regarding service of the applications or the evidence.

I have reviewed the oral and written evidence of the parties before me that met the requirements of the Dispute Resolution Rules of Procedure (Rules); however, I refer to only the relevant evidence regarding the facts and issues in this decision.

Issue(s) to be Decided

1. Is the landlord entitled to retain the tenant’s security deposit in satisfaction of their monetary claim and to recover the filing fee?

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

Background and Evidence

I heard undisputed evidence that this one year, fixed term tenancy began on July 1, 2013, monthly rent was \$1425 and the tenant paid a security deposit of \$712.50 at the beginning of the tenancy.

The fixed term of the tenancy was through June 30, 2014, and the tenancy actually ended on September 30, 2013, when the tenant vacated the rental unit.

Both parties are claiming the tenant's security deposit.

Landlord's application-

The landlord's monetary claim is \$762.50, which is the amount of a fee, \$712.50, for breaking the lease and the filing fee of \$50.

The landlord's relevant documentary evidence included a copy of the written tenancy agreement, an email from the tenant giving her notice that she was ending the tenancy as of September 30, 2013, due to a move to another country, and further email communication between the parties, including an explanation as to why the landlord would not be returning the tenant's security deposit to her.

In support of their application, the landlord submitted that they were entitled to the amount of \$712.50, which is the fee listed in the written tenancy agreement under "Tenant's Obligations." In explanation, the landlord testified that this is a standard industry fee for tenants who break the fixed term lease prior to the end of the fixed term.

In further explanation, the landlord testified that, as a property management company, they charge the owner one half of a month's rent for their fee, and it would unfair to charge the owner another fee so quickly after this tenancy began.

The landlord, who is an agent in this company, submitted that the landlord also is entitled to this fee due to their efforts in re-renting the property, such as marketing the rental unit, showing the property, completing paperwork, and in speaking to the strata company in charge of the building.

In response to my question, the landlord said that the amount requested was not a liquidated damages fee, but rather a fee charged by the landlord meant to compensate for finding a new tenant in the event of an early end to a fixed term agreement.

In response, the tenant submitted that this clause in the written tenancy agreement containing a fee for breaking the lease early was not explained to her by the landlord's agent at the time and that she continually asked the landlord for a breakdown of their costs as to why they were charging a fee for \$712.50, with no response.

The tenant further submitted that the first person who viewed the rental unit accepted the rental unit and moved in the month following her vacancy.

The tenant further submitted that the only reason she ended the tenancy was due to unexpected job relocation.

Tenant's application-

The tenant is requesting her security deposit of \$712.50 be returned to her.

The tenant submitted that her written forwarding address was provided to the landlord on September 30, 2013, the last day of the tenancy.

Analysis

Based on the relevant oral and written evidence, and on a balance of probabilities, I find as follows:

In a claim for damage or loss under the Act, which falls in sections 7 and 67, or tenancy agreement, the claiming party, both parties in this case, has to prove, with a balance of probabilities, four different elements:

First, proof that the damage or loss exists, **second**, that the damage or loss occurred due to the actions or neglect of the respondent in violation of the Act or agreement, **third**, verification of the actual loss or damage claimed and **fourth**, proof that the claimant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

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

Landlord's application-

In this case, the landlord has not claimed for damage or loss pursuant to section 7(1) of the Act; rather the landlord has claimed they are entitled to a fee of one half a month's rent due to the tenant breaking the lease prior to the end of the fixed term as provided in the written tenancy agreement.

The landlord additionally is not claiming they are entitled to liquidated damages, as the aforementioned clause was not such a clause, according to the landlord.

In explanation as to why I asked that question, 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. If the liquidated damage clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible.

In this case, the landlord stated that the clause in the tenancy agreement requiring the tenant to pay a fee equal to one half a month's rent was not a liquidated damages clause.

Due to the landlord's assertion, I have determined that the clause requiring the tenant to pay a fee, without such explanation as to how this clause is a genuine pre-estimate of loss, is a penalty, and is therefore unenforceable.

I therefore decline to award the landlord this fee and I likewise dismiss their application.

As I have dismissed the landlord's application, decline to award them a filing fee.

Tenant's application-

As I have dismissed the landlord's application claiming against the tenant's security deposit and for monetary compensation, I find the tenant is entitled to a return of her security deposit which was held in trust for the tenant during the tenancy.

Due to the above, I find the tenant is entitled to a total monetary award of \$762.50, comprised of her security deposit of \$712.50 and the filing fee of \$50.

Conclusion

The landlord's application is dismissed.

The tenant's application for monetary compensation is granted.

I grant the tenant a final, legally binding monetary order pursuant to section 67 of the Act for the amount of \$762.50, which I have enclosed with the tenant's Decision.

Should the landlord fail to pay the tenant this amount without delay after being served the order, the monetary order may be filed in the Provincial Court of British Columbia (Small Claims) for enforcement as an Order of that Court. The landlord is advised that costs of such enforcement are recoverable from the landlord.

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: January 13, 2014

Residential Tenancy Branch

