



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Bayside Properties Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      For the landlord: MNSD, MNR, MNDC, FF  
For the tenant: MNSD, CNR, 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 a monetary order for money owed or compensation for damage or loss and for unpaid rent, for authority to retain the tenant’s security deposit and pet damage deposit, and for recovery of the filing fee.

The tenant applied for a return of her security deposit, an order cancelling a 10 Day Notice to End Tenancy for Unpaid Rent (the “Notice”), 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 all 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, each party confirmed that they had received the other party’s evidence, with the exception of the landlord stating that she could not open the CD received from the tenant.

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.

*Preliminary issue*-The tenant had vacated the rental unit prior to filing her application and therefore it was not necessary to consider her request to cancel the landlord’s

notice to end the tenancy; as a result, I have amended the tenant's application and removed this issue.

Issue(s) to be Decided

1. Is the landlord entitled to retain the tenant's security deposit and pet damage deposit and to recover the filing fee?
2. Is the tenant entitled to a monetary order for a return of her security deposit and to recover the filing fee?

Background and Evidence

The parties provided undisputed evidence that the 1 year, fixed term tenancy began on September 1, 2013, ended on October 31, 2013, when the tenant vacated the rental unit, monthly rent was \$970, and the tenant paid a security deposit and pet damage deposit of \$485 each.

The landlord has retained the security deposit and pet damage deposit as they have made their application.

*Landlord's application-*

The landlord's monetary claim is \$1020, comprised of rental arrears of \$485, a lease break fee of \$485, and the filing fee of \$50.

In support of their application, the landlord submitted that they received notice on September 19, 2013, from the tenant that she was vacating the rental unit by October 31, 2013, well short of the end of the fixed term, which was through August 31, 2014.

The landlord submitted that the tenant paid only \$485 of the October rent and informed the landlord to keep her security deposit in satisfaction of the remainder of the monthly rent; in spite of this, the tenant refused to sign her authority giving the landlord permission to do so, according to the landlord.

The landlord submitted that they are not seeking further loss of rent revenue for the early end of the tenancy, as the rental unit was rented for November 1; however the landlord submitted that they are entitled to a fee, in this case, \$485, if the tenant "breaks" the lease during the fixed term tenancy, as noted in the addendum to the tenancy agreement. I note that the term in the addendum, a copy of which was

supplied by the landlord, states that the tenant “agrees to pay the equivalent of ½ month’s rent penalty,…”

The landlord submitted that, on the condition inspection report, they used the address provided by the tenant, which was her parent’s address, and confirmed with the tenant three times via telephone contact that this address was correct.

The landlord’s relevant documentary evidence included the written tenancy agreement, text message communication with the tenant, a condition inspection report, and a tenant ledger sheet.

In response, the tenant submitted she paid one half of the month’s rent for October and wrote to the landlord that they could keep her pet damage deposit for the balance of rent for October, in response to a 10 Day Notice to End Tenancy for Unpaid Rent or Utilities served by the landlord. The tenant submitted that the resident caretaker took this written document and crumbled it, while being verbally abusive to the tenant. The tenant supplied the written document into evidence.

The tenant was unclear as to the term in the addendum and the disposition of the two deposits, according to the tenant.

#### *Tenant’s application-*

The tenant’s monetary claim is \$485, for the return of her security deposit.

The tenant submitted that she gave the landlord sufficient notice to find another tenant by November 1, 2013.

The tenant disagreed that she owed a lease break fee.

#### Analysis

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

There was a significant amount of evidence submitted which did not pertain to the relevant issues and I have therefore not addressed this evidence.

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-*

*Unpaid rent for October-*As to the claim for unpaid rent for October, I find the tenant owed \$970 for monthly rent for October pursuant to the tenancy agreement and that she failed to pay the full amount, having paid \$485.

I therefore approve the landlord's claim for \$485, for a rent deficiency for October 2013.

*Lease break fee-*Although not termed a liquidated damages clause, the landlord is treating the lease break fee contained in an addendum to the tenancy agreement as such.

Residential Tenancy Branch Policy Guideline #4 (Liquidated Damages) states that in order to be enforceable, a liquidated damages clause in a tenancy agreement (clause 10 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. I agree with this policy.

As the term the landlord relied upon in making this claim specifically states that the fee charged is a penalty, I find such penalty clause is not enforceable under the Act and I therefore dismiss their claim for \$485.

*Tenant's application-*

As I have approved \$485 of the landlord's claim and dismissed the landlord's claim for an additional \$485, I therefore find the tenant is entitled to a return of \$485, which has been held by the landlord.

I therefore direct the landlord to return the tenant's security deposit of \$485.

*Both applications-*

As both applications contained merit, I have declined to award either party recovery of their filing fee.

Conclusion

The landlord's application is granted in part, and I authorize them to keep \$485 from a total of \$970 for the two deposits from the tenant they have retained.

The tenant's application for monetary compensation is granted in part as I have ordered the landlord to return the tenant's security deposit of \$485.

In the event the landlord does not return the security deposit of \$485 expeditiously, I grant the tenant a final, legally binding monetary order pursuant to section 67 of the Act in the amount of her monetary award of \$485, 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: February 24, 2014

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Residential Tenancy Branch

