



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding 534873 BC Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This was a hearing with respect to the landlord's application for a monetary order and an order to retain the tenant's security deposit in partial satisfaction of the monetary claim. The hearing was conducted by conference call. The landlord's representative called in and participated in the hearing. The tenant did not attend, although she was served with the application and Notice of Hearing and landlord's documents by registered mail. Documents submitted by the landlord included acknowledgements by e-mail from the tenant confirming that she received the documents.

Issue(s) to be Decided

Is the landlord entitled to a monetary award and if so, in what amount?
Is the landlord entitled to retain the security deposit?

Background and Evidence

The rental unit is a house in West Vancouver. The tenancy began on June 1, 2013 for a one year term with rent in the amount of \$3,395.00 payable on the first of each month. The tenant paid a security deposit of \$1,697.50 on June 2, 2013.

On September 3, 2013 the tenant gave the landlord notice that she intended to move out of the rental unit on December 1, 2013. The landlord replied by way of a letter from its lawyer to advise the tenant that she was in breach of her fixed term tenancy agreement. The landlord amended the application for dispute resolution. By the amended application it claimed payment of the sum of \$12,410.00.

The landlord's representative testified that the tenant moved out on December 1, 2013. He said the tenant did not clean the house and left debris scattered throughout. The landlord's representative testified that the unit was re-rented commencing February 15,

2014, but at a reduced rent of \$2,900.00 per month. In the written submission given in support of the application the landlord made the following claims:

• Missing toilet paper holder:	\$35.00
• Carpet cleaning:	\$189.00
• Cleaning by owner – 2 days:	\$300.00
• Replacement stove elements	\$35.00
• Painting by owner	\$100.00
• Unpaid municipal utility bill July – Oct	\$426.00
• Unpaid municipal utility bill Oct – Dec 31	\$432.00
• Unpaid municipal utility bill, est Jan – Feb 15	\$216.00
• Lawn cutting & leaf removal	260.00
• Keep Security deposit:	\$1,697.00
• Claim for Liquidated Damages: (referred to by the applicant as:”-Administration cost”)	\$1,697.00
• Loss of rent Dec to Feb 15:	\$8,488.00
• Loss of revenue Feb 15 to May 31	\$1,732.00
• Newspaper advertising:	\$148.00
• Keys not returned:	\$50.00
Total:	\$15,805.00
Less rent payment for December	-\$3,395.00
	\$12,410.00

The landlord referred to a provision of the tenancy agreement. He said that the provision, reproduced below, entitled him to receive an award of loss of revenue and what he referred to as “administrative costs’ although referred to as “liquidated damages” in the clause contained in the tenancy agreement.

If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, the landlord may, at the landlord’s option, treat this Tenancy Agreement as being at an end. In such event, the sum of \$1697.50 shall be paid by the tenant to the landlord as liquidated damages, and not as a penalty, to cover the administrative costs of re-renting the said premises. The landlord and tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damage to the premises and damages as a result of rental income due to the Tenant’s breach of any term of this Agreement.

The clause is a slightly modified version of a term contained in a standard form of contract used by many commercial landlords.

At the hearing the landlord was insistent that he expected the tenant to honour the fixed term tenancy agreement and he confirmed that he considered that the tenant was responsible for the payment of rent to the end of the fixed term, subject to the landlord's his duty to mitigate its loss by seeking out another tenant to rent the unit for the remainder of the term. The landlord's claim included a claim for the difference in rent paid by his new tenants and the rent paid by his former tenant up to the end of the fixed term tenancy on May 31, 2014.

Analysis

Dealing first with the landlord's claims for damages, cleaning and utilities, based on the evidence submitted, including photographs showing the condition of the rental unit after the tenant vacated, I find that the landlord is entitled to recover the amounts claimed for repairs and cleaning, including lawn cutting and leaf removal and key replacement. These amounts come to \$969.00. The landlord claimed amounts for unpaid utilities. I allow the claims for utilities in the total amount of \$858.00, based on the receipts provided, but I do not allow the claimed amount of \$216.00 for estimated utilities in the absence of proof of actual expenditure and particularly when it is for a period after the tenant ceased to occupy the rental unit.

I find that the landlord is entitled to the amounts claimed for loss of rental income for the period from January 1, 2014 to February 15, 2014 in the amount of \$5,092.50 and for the period from February 15, 2014 to May 31, 2014 in the amount of \$1,732.50.

With respect to the tenant's security deposit, in its calculations the landlord has added the amount of the security deposit to its list of claimed expenditures, rather than showing the deposit as a credit in favour of the tenant to be deducted from the total amount claimed from her. The amount of the security deposit will be set off against the award in favour of the landlord.

I do not allow the landlord's claim for liquidated damages. The tenancy agreement is a contract of adhesion drawn by the landlord. If the tenant wished to rent from the landlord she was obliged to accept the terms of the agreement without modification. The liquidated damage clause must therefore be interpreted having regard to the *Contra Proferentem* doctrine: simply put, this means that any ambiguity in the clause in question must be resolved in the manner most favourable to the tenant.

A liquidated damage clause is supposed to fix an amount to be paid lieu of proved damages, not in addition to them, so as to avoid the necessity of proving actual

damages. If the landlord wished to claim liquidated damages, according to the provision, he was required, at his option, to elect to “treat the tenancy agreement as being at an end”. I interpret this provision as giving the landlord the option of treating the Agreement as being at an end, as opposed to treating the Agreement as a continuing agreement with continuing obligations on the part of the tenant. The landlord has clearly elected to treat the tenant’s obligations under the tenancy agreement as continuing because his claims for loss of rental income until the end of the term of the tenancy are predicated upon a continuing obligation to pay rent until the end of the fixed term. The landlord, having elected to keep the agreement alive, is not entitled to claim the liquidated damage amount in addition to the actual damages running to the end of the term; this claim is therefore dismissed without leave to reapply. The landlord is, however entitled to recover its actual advertising expenditures as claimed, because this was a legitimate cost incurred in mitigation. The claim for newspaper advertising of \$148.00 is allowed.

I have allowed the following:

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|--------------------------|------------|
| • Cleaning repairs: | \$969.00 |
| • Unpaid utilities: | \$858.00 |
| • Loss of rental income: | \$6,825.00 |
| • Advertising: | \$148.00 |

Conclusion

The total amount of the allowed claims is the sum of \$8,800.00. The landlord is entitled to recover the \$100.00 filing fee for this application for a total award of \$8,900.00. I order that the landlord retain the security deposit of \$1,697.50 in partial satisfaction of this award and I grant the landlord an order under section 67 for the balance of \$7,202.50. This order may be registered in the 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 17, 2014

Residential Tenancy Branch

