



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding BAYSIDE PROPERTY SERVICES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC, MNSD, FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the landlord for a monetary order for money owed or compensation for damage or loss under the Act, to keep all or part of the security deposit and to recover the cost of the filing fee from the tenant.

Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross-examine the other party, and make submissions at the hearing.

The parties confirmed receipt of all evidence submissions and there were no disputes in relation to review of the evidence submissions

I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure. I refer only to the relevant facts and issues in this decision.

Issues to be Decided

Is the landlord entitled to a monetary order for money owed?

Is the landlord entitled to retain the security deposit in partial satisfaction of the claim?

Is the landlord entitled to recover the filing from the tenant?

Background and Evidence

The parties entered into a fixed term tenancy which began on July 1, 2013 and was to expire on June 30, 2014. Rent in the amount of \$900.00 was payable on the first of each month. A security deposit of \$450.00 was paid by the tenant.

The landlord claims as follows:

a.	Liquidated damages	\$450.00
b.	Filing fee	\$ 50.00
	Total claimed	\$500.00

The landlord's testified that the tenant breached the fixed term agreement by vacating the premises earlier than the tenancy agreement allowed and because of that breach they are entitled to recover the liquidated damages clause that is in the addendum to the tenancy agreement. The landlord stated this was a genuine pre-estimate of the cost of re-renting the rental unit. Filed in evidence is a copy of the tenancy agreement and addendum to the tenancy agreement.

The landlord's agent testified that the tenant also agreed that they could retain the security deposit for breaching the tenancy agreement; however, at the move-out inspection the tenant withdrew that consent. Filed in evidence is a letter dated February 25, 2014 and a move-out inspection, which supports the landlord's position.

The landlord's witness testified that he spent a lot of time going over the terms of the tenancy agreement with the tenant and she was told that if she did not honour the fixed term agreement she is required to pay $\frac{1}{2}$ a month rent.

The tenant testified that at the start of the tenancy she was told that if she did not honour the fixed term agreement that she would have to pay a penalty of $\frac{1}{2}$ month's rent. The tenant stated in her letter of February 25, 2014, she agreed that the landlord was allowed to keep the deposit based on the penalty, however, after doing research she discovered they are not allowed to charge a penalty and as a result, she refused on the move-out inspection that the landlord could keep her security deposit.

The tenant's assistant stated that the landlord was not entitled to make a claim against the security deposit as they had failed to complete a move-in and move-out inspection and as a result the tenant should be entitled to receive double the return of the deposit.

The landlord's agent argued that the tenant was fully aware of the liquated damages clause and was aware this was a genuine pre-estimate and not a penalty. The landlord stated they filed their application within the legislative timeline and the tenant is not entitled to double the security deposit.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

Under the Residential Tenancy Policy Guideline #4, a liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the amount 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 will be unenforceable.

In this case, I have reviewed the addendum to the tenancy agreement. Based on the agreement, I find the agreement clearly states that this is a penalty; there is no wording in the term which would lead me to believe that this was a genuine pre-estimate of the

loss at the time the contract was entered into. Therefore, I find the term is unenforceable.

I have also review the tenant's letter of February 25, 2014, which notified the landlord that they are entitled to keep the security deposit, however, I accept that the tenant was unaware at the time that this term was unenforceable and later withdrew that consent.

Under Section 5 of the Act, landlords and tenants may not avoid or contract out of this Act or the regulations and any attempt to avoid or contract out of this Act or the regulations is of no effect. Therefore, I find the landlord is not entitled to recover the penalty clause, whether or not the tenant first gave her consent to keep the security deposit.

Therefore, I dismiss the landlord's claim in it's entirely. As the landlord was not successful the landlord is not entitled to recover the filing fee from the tenant.

As I have dismissed the landlord's claim to keep the security deposit. The tenant is entitled to a monetary order for the return of the security deposit.

In this case, the tenant seeks to apply section 38(6) of the Act, however, that section of the Act, does not apply to this case, as the landlord applied within 15 days of the tenancy ending. I find the tenant has failed to prove the landlord violation section 38(1) of the Act.

Therefore, I find the tenant is entitled to a monetary order for the return of the security deposit in the amount of **\$450.00**. This order may be enforced in the Provincial Court (Small Claims division) should the landlord fail to comply with this order.

Conclusion

The landlord's application is dismissed. The tenant is entitled to a monetary order for the return of the security deposit in the amount stated above.

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 05, 2014

Residential Tenancy Branch

