



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's October 15, 2014 Application for Dispute Resolution, in which the landlord has requested compensation for damage or loss under the Act, to retain the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

The agent for the landlord provided affirmed testimony that on October 22, 2014 copies of the Application for Dispute Resolution and Notice of Hearing and evidence were sent to the tenant by registered mail. A Canada Post tracking number and receipt was provided as evidence of service to the address provided by the tenant at the end of the tenancy.

These documents are deemed to have been served in accordance with section 89 and 90 of the Act; however the tenant did not appear at the hearing.

Issue(s) to be Decided

Is the landlord entitled to compensation as a result of the tenant ending the tenancy in breach of the Act?

May the landlord retain the security deposit?

Background and Evidence

The tenancy commenced on September 1, 2014. Rent was \$650.00 due on the 1st day of the month. A security deposit in the sum of \$325.00 was paid. An addendum, with an initial on the final page, included a term requiring payment of liquidated damages equivalent to one-half of 1 month's rent. Clause 31 read, in part:

"the tenants agree that if this is a lease and they terminate the tenancy before the lease is over, they are liable for liquidated damages....."

Clause 32 of the addendum states:

“Insufficient Notice: Should the tenant give improper/insufficient notice to vacate there shall be an additional charge of one month’s rent.”

A copy of the tenancy agreement and addendum was submitted as evidence.

On September 11, 2014 the tenant issued a notice ending his month-to-month tenancy effective September 30, 2014. A copy of the notice was supplied as evidence.

The landlord has applied claiming compensation in the sum of \$341.25 as a result of the improper notice ending the tenancy and the cost of re-renting the unit.

The landlord supplied an October 1, 2014 invoice in the sum of \$341.25 for the property management fee levied.

There was no loss of rent revenue as the rental unit was re-rented effective October 1, 2014.

Analysis

When making a claim for damages under a tenancy agreement or the Act, the party making the allegations has the burden of proving their claim. Proving a claim in damages requires that it be established that the damage or loss occurred, that the damage or loss was a result of a breach of the tenancy agreement or Act, verification of the actual loss or damage claimed and proof that the party took all reasonable measures to mitigate their loss.

Residential Tenancy Branch policy #4 provides:

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages 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 as a result will be unenforceable. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

Clause 31 of the tenancy agreement addendum references payment of liquidated damages in relation to a lease and termination of a lease before the ‘lease is over.’ This tenancy was not a lease (fixed-term) agreement, but a month-to-month term. Therefore, I find that clause 31 does not refer to this situation, where the tenant has breached section 45 of the Act. Written notice in the approved form given by the tenant on September 11, 2014 would have supported a tenancy end date of October 31, 2014. Therefore, I find that the claim for the cost of re-renting, as liquidated damages, is not supported and is dismissed.

Clause 32 of the addendum does not provide any indication that the charge is a

genuine pre-estimate of loss equivalent to 1 month's rent or that it relates in any way to the actual costs of re-renting the unit. I find that this clause is not set out as liquidated damages but simply as a penalty to be paid if a tenant gives insufficient notice to end the tenancy.

Penalties are not contemplated by the legislation. Section 6(3) of the Act provides:

- (3) A term of a tenancy agreement is not enforceable if*
- (a) the term is inconsistent with this Act or the regulations,*
 - (b) the term is unconscionable, or*
 - (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.*

Therefore, I find that clause 32 is not consistent with the Act and is enforceable.

Residential Tenancy Branch policy suggests that when a landlord applies to retain the deposit, any balance should be ordered returned to the tenant; I find this to be a reasonable stance. Therefore, as the landlord's claim is dismissed I find that the tenant is entitled to return of the \$325.00 security deposit.

Based on these determinations I grant the tenant a monetary Order in the sum of \$325.00. In the event that the landlord does not comply with this Order, it may be served on the landlord, filed with the Province of British Columbia Small Claims Court and enforced as an Order of that Court.

Conclusion

The landlord's application is dismissed.

The landlord is Ordered to return the security deposit to the tenant. A monetary Order has been issued to the tenant.

This decision is final and binding and 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: March 03, 2015

Residential Tenancy Branch

