



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARTMENT RENTALS LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: *MNSD, MNDC, MNR, MNDC, FF*

Introduction

This hearing dealt with an application by the landlord pursuant to the *Residential Tenancy Act*, for a monetary order for loss of income, liquidated damages, the filing fee and to retain a portion of the security deposit in satisfaction of the claim. Both parties attended the hearing and were given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to a monetary order for loss of income, liquidated damages and the filing fee? Is the landlord entitled to retain the security deposit?

Background and Evidence

Both parties agreed that the tenancy started on July 01, 2014 for a fixed term of one year. Rent was \$1,125.00 due on the first day of each month. Prior to moving in the tenant paid a deposit of \$1,125.00. Neither party filed a copy of the tenancy agreement.

The tenant stated that on or about September 10, 2014, he told the landlord that he intended to end the tenancy and on September 26, 2014, he gave the landlord a written notice to do so. The tenant moved out the next day. The landlord found a tenant for October 13, 2014 and is claiming loss of income for the period of October 01-12, 2014. The landlord is also claiming liquidated damages for a breach on the tenant's part when he ended the tenancy prior to the end date of the fixed term.

Analysis

Section 45 of the *Residential Tenancy Act*, states that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice.

This date must also not be earlier than the date specified in the tenancy agreement as the end of the tenancy, and is the day before the day in the month that rent is payable under the tenancy agreement.

By ending the tenancy prior to the end date of the fixed term, the tenant breached the agreement and therefore the landlord is entitled to damages in an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement.

As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenancy could legally have ended the tenancy. In all cases, the landlord's claim is subject to the statutory duty to mitigate the loss by making attempts to re-rent the unit.

Section 7(2) of the *Residential Tenancy Act*, states that a landlord who claims compensation for loss that results from the tenant's noncompliance with the tenancy agreement must do whatever is reasonable to minimize the loss.

Based on the testimony of both parties, I find that the tenant gave written notice on September 26, 2014 and moved out on September 27, 2014. Despite the inadequate notice the landlord was able to find a tenant for October 13, 2014 thereby mitigating his losses to \$418.50. Based on the date of the tenant's notice to end tenancy and the landlord's efforts to mitigate his losses, I find that the tenant is responsible for the loss of income suffered by the landlord.

In the tenancy agreement the parties agree to the amount of the liquidated damages to be paid in the event the tenant ends the tenancy prior to the end date. Section 4 of the *Residential Tenancy Policy Guideline* addresses liquidated damages and states that 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.

One of the tests to determine if the clause is a penalty clause or a liquidated damages clause is that the sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. In addition, a clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss. Clauses regarding the payment of liquidated damages can also be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

In this case, the landlord did not file a copy of the tenancy agreement or an addendum containing the liquidated damages clause and therefore I am unable to determine the validity of the clause and whether the clause is a penalty clause or whether it is oppressive to the tenant.

In the absence of evidence to support the landlord's claim for liquidated damages, I dismiss this portion of the landlord's claim.

Since the landlord has proven a portion of his claim, he is entitled to the filing fee of \$50.00.

Overall the landlord has established a claim as follows:

1.	Loss of income for October	\$418.50
2.	Filing fee	\$50.00
	Total	\$468.50

I order that the landlord retain \$468.50 from the security deposit of \$1,125.00 in full satisfaction of the claim and I order the landlord to return the balance of \$656.50 to the tenant within 15 days of receipt of this decision.

Conclusion

The landlord must return **\$656.50** to the tenant.

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: May 26, 2015

Residential Tenancy Branch

