



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Orca Realty Inc.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: MNR, MNDC, MNSD, FF
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Introduction

This hearing concerns 2 applications:

- i) by the landlord for a monetary order as compensation for unpaid rent / compensation for damage or loss under the Act, Regulation or tenancy agreement / retention of the security deposit and pet damage deposit / and recovery of the filing fee; and
- ii) by the tenant for a monetary order as compensation for damage or loss under the Act, Regulation or tenancy agreement / return of the security deposit and pet damage deposit / and recovery of the filing fee.

Both parties attended and / or were represented and gave affirmed testimony.

Issue(s) to be Decided

Whether either party is entitled to any of the above under the Act, Regulation or tenancy agreement.

Background and Evidence

Pursuant to a written tenancy agreement signed by the parties on September 08, 2014, the fixed term tenancy is from October 01, 2014 to September 30, 2015. Monthly rent of \$3,500.00 is due and payable in advance on the first day of each month. A security deposit of \$1,750.00 and a pet damage deposit of \$1,750.00 were collected.

The tenant passed away on September 10, 2014. On September 11, 2014, the tenant's daughter, "MM," sent an email to the landlord's agent informing the landlord of the tenant's passing. Subsequently, beginning on September 18, 2014 the landlord's agent

began advertising for new renters. The landlord testified that advertising was undertaken by way of craigslist, the agent's website, and signage posted at the front of the property. Thereafter, as no renter was found, the owner listed the property for sale on or about January 09, 2015, and the property sold on or about January 12, 2015.

The landlord holds and wishes to retain the following monies totalling \$10,500.00:

\$1,750.00: *security deposit*
\$1,750.00: *pet damage deposit*
\$3,500.00: *rent for October 2014*
\$3,500.00: *rent for November 2014*

Additional compensation sought by the landlord in the application is as follows:

\$3,500.00: *loss of rental income for December 2014*
\$1,837.50: *landlord's calculation of liquidated damages + GST*
\$100.00: *filing fee*

GRAND TOTAL: \$15,937.50

The tenant seeks the following compensation:

\$1,750.00: *repayment of security deposit*
\$1,750.00: *repayment of pet damage deposit*
\$3,500.00: *repayment of rent paid for October 2014*
\$3,500.00: *repayment of rent paid for November 2014*
Sub- Total: \$10,500.00
MINUS \$1,785.00: *tenant's calculation of liquidated damages + GST*
Sub-Total: \$8,715.00

\$3,500.00: *"penalty" assessed for alleged failure to repay security and pet damage deposits within limits set out in section 38 of the Act*

\$2,000.00: *\$1,000.00 x 2 for "aggravated damages."*

\$100.00: *filing fee*

GRAND TOTAL: \$14,315.00

Analysis

At the outset, the attention of the parties is drawn to statutory provisions and Guidelines which are particularly relevant to the circumstances of this dispute.

Section 1 of the Act addresses **Definitions**, and provides in part:

1 In this Act:

“tenant” includes

- (a) the estate of a deceased tenant, and
- (b) when the context requires, a former or prospective tenant.

Section 16 of the Act addresses **Start of rights and obligations under tenancy agreement**:

16 The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Section 44 of the Act addresses **How a tenancy ends**, in part:

44(1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:
 - (i) section 45 *[tenant's notice]*;
- (e) the tenancy agreement is frustrated;

Section 45 addresses **Tenant's notice**, in part:

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice;

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 7 of the Act addresses **Liability for not complying with this Act or a tenancy agreement**:

7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss

Further, Residential Tenancy Policy Guideline # 34 speaks to "Frustration," in part:

A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.

The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned.

Additionally, Residential Tenancy Policy Guideline # 4 speaks to "Liquidated Damages," in part:

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.

The subject tenancy agreement provides for **Liquidated Damages** as follows:

If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this agreement that causes the Landlord to end the tenancy before the end of the term as set out (1B) above, or any subsequent fixed term, the tenant will pay to the landlord the Sum of \$1,700.00 + GST as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the Landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant such as unpaid rent or for damage to the rental unit or residential property.

Based on the documentary evidence and testimony, and in consideration of the relevant statutory provisions and Guidelines, the various aspects of the respective applications and my findings are set out below.

LANDLORD

\$3,500.00: *rent for October 2014*

\$3,500.00: *rent for November 2014*

\$3,500.00: *loss of rental income for December 2014*

I find that the tenant's passing prior to the time when she was to have taken possession of the unit, resulted in a difficult set of circumstances for both parties, but particularly for the tenant's family who mourned the unexpected loss. Despite these circumstances, I find that the deceased tenant's estate was obligated by the terms of the written tenancy agreement which provided for a fixed term tenancy. Following the landlord's receipt of notice that the tenant had passed, I find that the landlord attempted to mitigate the loss of rental income by advertising for new renters in a timely fashion. Accordingly, I find that the landlord has established entitlement to the full amount claimed.

\$1,837.50: *liquidated damages + GST*

I find that the correct amount is \$1,785.00 (\$1,700.00 + \$85.00), rather than the amount documented in the landlord's application of \$1,837.50. Specifically, the amount of the

liquidated damages pursuant to the addendum to the tenancy agreement is documented as \$1,700.00, and in British Columbia the amount of the GST is 5%.

Arising from the untimely and unanticipated passing of the tenant, there was a breach of the fixed term tenancy. While the tenant's passing precluded her from taking possession of the unit, I find that responsibility for fulfilling the terms of the fixed term tenancy agreement fell to the estate. Accordingly, I find that the agreement was not frustrated. Following from all of the foregoing, I find that the landlord has established entitlement to liquidated damages plus GST in the total amount of **\$1,785.00**.

\$100.00: *filing fee*

As the landlord has succeeded with the main aspects of this application, I find that the landlord has also established entitlement to recovery of the full \$100.00 filing fee.

Sub-Total entitlement: \$12,385.00 (\$3,500.00 + \$3,500.00 + \$3,500.00 + \$1,785.00 + \$100.00).

I order that the landlord retain the security deposit and the pet damage deposit in the combined amount of **\$3,500.00** (\$1,750.00 + \$1,750.00), in addition to rent which has already been collected for October and November 2014 in the combined amount of **\$7,000.00** (\$3,500.00 + \$3,500.00) [total held: \$10,500.00], and I grant the landlord a **monetary order** for the balance owed of **\$1,885.00** (\$12,385.00 - \$10,500.00).

TENANT

\$1,750.00: *reimbursement of rent paid for October 2014*

\$1,750.00: *reimbursement of rent paid for November 2014*

The disposition of rent collected for these 2 months has been addressed above. In summary, this aspect of the tenant's application is dismissed.

\$7,000.00: *[(2 x \$1,750.00) + 2 x (\$1,750.00)] the double return of the security deposit and pet damage deposit*

The disposition of the security deposit and pet damage deposit has been decided above. Specifically, I have found that the landlord has established entitlement to retention of both deposits. However, their disposition is further addressed here in specific relation to section 38 of the Act, which speaks to **Return of security deposit and pet damage deposit** and addresses doubling provisions.

In part, section 38 of the Act provides that within 15 days after the later of the date the tenancy ends, and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security / pet damage deposit, or file an application for dispute resolution. If the landlord does neither, section 38(6) of the Act provides that the landlord may not make a claim against the security / pet damage deposit, and must pay the tenant double the security / pet damage deposit.

In the circumstances of this dispute, I find that the later of the 2 critical dates identified in section 38 of the Act is the date when tenancy ended. I find that the date the tenancy ended is the date when the property sold, which was on or about January 12, 2015. The landlord's application, which includes an application to retain the security / pet damage deposit, was filed on January 22, 2015, which is within 15 days after January 12, 2015. Even if I were to find that the tenancy ended effective on or about January 09, 2015 which is when the unit was listed for sale, the landlord's application was still filed within the statutory 15 day period. In the result, I find that the doubling provisions of the Act are not triggered, and this aspect of the application must be dismissed.

\$2,000.00: *"aggravated damages"*

I have earlier noted that the tenant's passing led to a difficult set of circumstances for both parties. I find, however, that the landlord was sensitive to the family's personal loss, undertook to mitigate the loss of rental income through timely advertising for new renters before deciding to sell, and sought to have the Branch adjudicate the matter by way of an application for dispute resolution. In the result, I find that the tenant has failed to meet the burden of proving that the landlord's conduct breached the Act, Regulation or tenancy agreement, or was otherwise willful, reckless or indifferent. This aspect of the application is therefore dismissed.

\$100.00: *filing fee*

As the tenant has not succeeded in establishing entitlement to compensation arising from the main aspects of the application, I find that the application to recover the filing fee must be dismissed.

Conclusion

The tenant's application is dismissed.

Pursuant to section 67 of the Act, I hereby issue a **monetary order** in favour of the landlord in the amount of **\$1,885.00**. Should it be necessary, this order may be served on the tenant, filed 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: June 23, 2015

Residential Tenancy Branch

