



Dispute Resolution Services

Page: 1

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, MNSD, MNDC, FF

Introduction

This was a hearing with respect to the landlord's application for a monetary award and for an order to retain the tenants' security deposit in partial satisfaction of the monetary claim. The hearing was conducted by conference call. The landlord's agent called in and participated in the hearing. The tenants did not attend the hearing although they were served with the application and Notice of Hearing sent by registered mail on October 23, 2014. Canada Post records state that the tenants received and signed for the documents on October 27, 2014.

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 April 1, 2014 for a one year term ending March 31, 2015. The monthly rent was \$6,500.00, payable on the first of each month. The tenants paid a security deposit of \$3,250.00 and a pet deposit of \$3,250.00 prior to the commencement of the tenancy.

The landlord's representative testified that the tenants moved out of the rental unit on July 31, 2014. The landlord advertised the unit but did not succeed in securing a new tenant until September for a tenancy that commenced on October 1, 2014. The monthly rent for the new tenancy was \$5,500.00 per month.

The landlord has claimed loss of rental income for the months of August and September and for a rent differential of \$1,000.00 for the balance of the fixed term for a total amount of \$6,000.00.

The landlord claimed the sum of \$3,412.50, said to be a rental fee for the costs of finding a new tenant. The landlord's representative submitted a copy of an invoice for the said amount from the property management firm to the owner of the rental property.

The landlord claimed \$1,018.50 for lawn and garden care. The landlord's representative referred me to the tenancy agreement which contained a provision that yard work was to be the responsibility of the tenant, including grass and tree trimming less than six feet.

The landlord claimed amounts for unpaid utilities. The landlord provided an invoice from the City for water utilities for the period from April 1, 2014 to June 30, 2014 in the amount of \$387.29. The landlord claimed a further amount of \$387.29 said to be a projection for July to September, 2014, but it did not provide an invoice for the claimed amount.

Analysis

The tenants breached the tenancy agreement by moving out before the end of the fixed term. The landlord was under an obligation pursuant to section 7 of the *Residential Tenancy Act* to do whatever is reasonable to minimize its loss and I find that it did so by re-renting the unit to new tenants commencing October 1, 2014. I allow the landlord's claim for loss of rental income for August and September in the amount of \$13,000.00. I award the landlord the additional amount of \$6,000.00 for the rent differential of \$1,000.00 per month for the remaining six month of the term of the agreement.

The landlord claimed to be entitled to payment of the full amount billed to the owner by its property manager for services rendered for: "Finding suitable tenant". The tenancy agreement includes a "liquidated damages" clause. It obligates the tenants to pay the sum of \$3,250.00 as liquidated damages if the tenants end the tenancy before the end of the fixed term. Liquidated damages are said to be an agreed pre-estimate of the landlord's costs of re-renting the rental unit, to be paid in addition to any other amounts owed by the tenant, such as unpaid rent. The clause refers only to amounts **owed**, (emphasis added). It does not refer to loss of rental income or to amounts, including rental payments that may become due in the future.

The tenancy agreement is a contract of adhesion drawn by the landlord. If the tenant wished to rent from the landlord he 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.

Payment of a liquidated damage amount is triggered by the ending of the fixed term tenancy agreement before the expiry of the term, as opposed to the landlord's election to affirm the contract and require the tenant to continue to be responsible for payment of rent thereunder despite the tenants' breach of the agreement. I find that the liquidated damage clause in this case requires the landlord to make a choice; if the landlord chooses to claim the liquidated damage amount it must elect to treat the contract as being at an end. This choice is incompatible with a claim for future loss of rent because the tenants' obligation to pay rent is

dependent upon the landlord's affirmation of the contract. In order to hold the tenant accountable for future rent, subject only to the landlord's obligation to mitigate its loss, the landlord must in essence say to the tenants: "I expect you to continue to abide by your agreement to pay rent until the end of the term." I find that the landlord may not end the agreement on the one hand so as to claim liquidated damages and at the same time demand that the tenants abide by the agreement. The landlord has claimed and has been awarded loss of rental income to the end of the fixed term and I therefore find that it is not entitled to the full measure of damages to the end of the fixed term and as well to the liquidated damage amount. I note as well, that the landlord is under a statutory obligation to pursuant to section 7(2) of the *Residential Tenancy Act*. The section provides that the landlord: "must do whatever is reasonable to minimize the damage or loss."

The landlord is entitled to recover the amount claimed for lawn and garden care, namely: the sum of \$1,018.50. I allow the landlord's claim for water utilities in the amount of \$387.50. The landlord has not provided an invoice for utilities for any period after June, 2014, although it was open to the landlord to do so and I deny the claim for a projected or estimated amount.

Conclusion

The total award to the landlord is the sum of \$20,406.00. The landlord is entitled to recover the \$100.00 filing fee for this application, for a total award of \$20,506.00. I order that the landlord retain the security and pet deposits of \$6,500.00 in partial satisfaction of the award and I grant the landlord an order under section 67 for the balance of \$14,006.00. 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: June 25, 2015

Residential Tenancy Branch

