



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOLMES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FF, MND, MNDC, MNR, MNSD

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord for a Monetary Order for unpaid rent, for loss of rent, for compensation under the Act and the tenancy agreement, for damage and cleaning of the rental unit, for an Order to retain the security deposit in partial satisfaction of the claim and to recover the filing fee for the Application.

The original hearing was scheduled for January 27, 2015, and was rescheduled by the mutual consent of the parties.

C.F., the Landlord's managing broker appeared at the hearing. The Tenant, S.B., also appeared at the hearing. Although the tenancy agreement also included another tenant, E.B., and she was named on the Landlord's application for dispute resolution, the Landlord confirmed that E.B. vacated the rental unit and was not served with the application or notice of hearing.

The hearing process was explained and the participants were asked if they had any questions. Both parties provided 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 to me.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the rules of procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue to be Decided

Is the Landlord entitled to monetary compensation from the Tenant?

Background and Evidence

This tenancy began August 1, 2008 as a one year fixed term tenancy. Originally rent was payable in the amount of \$1,244.00 per month in addition to \$200.00 as a “flat rate utility” charge. The tenancy continued to be renewed as a one year fixed term with the most recent fixed term from August 1, 2014 to July 31, 2015. At the time of the hearing, rent was payable in the amount of \$1,402.00 in addition to \$220.00 for the flat rate utility charge for a total monthly payment of \$1,622.00.

The Landlord advised that the Tenant paid a \$600.00 security deposit as well as a \$600.00 pet damage deposit for a total of \$1,200.00; for reasons unknown to either party, but agreed to by both as correct, the amount held by the Landlord at the time of the hearing was \$1,190.43 (the “Deposit”).

The residential tenancy agreement was introduced in evidence and included a \$500.00 liquidated damages clause which read as follows:

LIQUIDATED DAMAGES. *If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of **\$500** as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

The Landlord testified that the Tenant vacated the rental unit on October 31, 2014 and that the rental unit was not rented until January 2015.

The Landlord also introduced in evidence copies of internal emails within the property management company responsible for the rental unit which detailed showings and marketing of the rental unit. One such email, dated November 3, 2014, indicates that the rental unit was “reposted Friday”, presumably meaning on October 31, 2014.

Also in evidence were emails between S.B. and C.A. wherein each attempted to schedule the move out condition inspection. In an email dated October 29, 2014 the

Tenant provided the Landlord with his forwarding address in writing. In this email the Tenant writes that he travelled by ferry on October 27, 2014 in order to participate in the move out condition inspection. He further writes that he left messages with C.A. on October 27 and 28, 2014 confirming he was on Vancouver Island and able to participate in the move out inspection.

The Tenant vacated the property, however, the Landlord submitted that they incurred costs to clean and repair the rental unit due to the condition it was left in by the Tenant. The Landlord submitted photos of the rental unit as well as the receipts for cleaning and repair.

On the Monetary Orders Worksheet the Landlord claimed as follows:

Outstanding rent for November and December 2014	\$3,244.00
Outstanding utilities for November and December 2014	\$440.00
NSF/late fees for November and December 2014	\$100.00
Liquidated damages	\$500.00
Repairs/cleaning (receipt in evidence)	\$281.40
Carpet Cleaning (receipt in evidence)	\$99.00
Total claimed on Monetary Orders Worksheet	\$4,664.40

The Landlord confirmed that they did not receive any N.S.F. funds such that they only sought \$50.00 for the late fee for both November and December 2014, rather than the \$100.00 requested above.

The Tenant submitted that the Landlord's request was inflated as she requested payment of the flat rate utility charge twice (including it in the outstanding rent amount initially). The Landlord, upon reviewing the Monetary Orders Worksheet confirmed that the amount owing for rent *and* utilities was a total of \$3,244.00 and that the additional request for \$440.00 was in error.

Introduced in evidence were copies of emails between the Tenant and another representative of the Landlord, C.A. including an email dated October 9, 2014 in which C.A. wrote: "I can waive 50% of the lease break due to "hardship". During the hearing, C.F. conceded that the Landlord was willing to honour C.A.'s proposal to reduce the liquidated damages to \$250.00.

In consideration of the above adjustments, the Landlord confirmed that they sought the following:

Outstanding rent for November and December 2014	\$3,244.00
NSF/late fees for November and December 2014	\$50.00
Liquidated damages	\$250.00
Repairs/cleaning (receipt in evidence)	\$281.40
Carpet Cleaning (receipt in evidence)	\$99.00
Total claimed	\$3,924.40

The Tenant submitted that his roommate, R.I., was willing to take over the rental unit which would have resulted in the Landlord recovering the November and December rent. Despite R.I. residing in the rental unit for six months, the Landlord refused his request to take over the rental unit. No details were provided as to why R.I. was not a suitable renter.

The Tenant further submitted that the Landlord did not advertise the rental unit in a timely manner. In sum, the Tenant submits the Landlord did not exercise due diligence in advertising and marketing the rental unit, failed to consider a viable tenant who had already resided in the rental unit and was able to take over the rent obligations and therefore the Landlord failed to mitigate their loss.

The Tenant further submitted that he left the rental unit in better condition than when he moved in in 2007. He stated that he fixed holes and painted the walls. He also said that he steam cleaned the carpet, but as the carpet was at least 10-12 years old and there was nothing he could do to make it better. He drew my attention to the move in condition inspection report which confirmed that the carpet was missing on the top two steps.

The Tenant also stated that he did not damage the rental unit and that any issues noted by the Landlord were simply normal wear and tear after a seven year tenancy. Further, he submitted that the Landlord did not perform a move in condition inspection at the beginning of the subsequent fixed term tenancies such that it was not possible to say the condition of the rental unit at the start of the final fixed term tenancy.

The Tenant submitted that the Landlord failed to perform a move out condition inspection in accordance with the Act and Regulations. The Tenant submitted copies of email correspondence between himself and C.A. the Property Manager. In those emails, the Tenant reminds the Landlord that he no longer resides in the community on Vancouver Island in which the rental unit was located and must take a ferry to

participate in the move out condition inspection. In an email dated October 29, 2014 the Tenant communicates to C.A. that he returned to Vancouver Island, and called and left a message for her on October 27 and 28, 2014 in order to participate in the move out inspection.

Of particular note, in the aforementioned October 9, 2014 letter from C.A. to the Tenant she writes that she is providing the Tenant with his *first* notice in writing to schedule an outgoing inspection. There was no evidence submitted by the Landlord, nor the Tenant, which indicated the landlord sent the *second* notice in writing as required by section 17(2)(b) of the *Residential Tenancy Regulation*.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim and the burden of proof is based on the balance of probabilities.

Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. that the other party violated the *Act*, regulations, or tenancy agreement;
2. that the violation caused the party making the application to incur damages or loss as a result of the violation;
3. the value of the loss; and,
4. that the party making the application did whatever was reasonable to minimize the damage or loss.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage and or loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenant. Once that has been established, the Landlords must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlords took reasonable steps to minimize the damage or losses that were incurred.

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

I find the Tenant breached the fixed term tenancy agreement by ending the tenancy prior to its expiration on July 31, 2015. The Landlord seeks lost rental income for November and December 2014.

The Landlord has a duty to mitigate their loss pursuant to section 7 of the *Act* which provides as follows:

(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.

The Tenant submitted that his roommate, R.I. was denied the opportunity to rent the rental unit. The Landlord failed to provide any justification as to why R.I. was unacceptable as a prospective tenant. I find that the Landlord did not take adequate steps to mitigate their loss, and accordingly I deny their request for compensation for the month of December 2014. I award the Landlord lost rent and utilities for the month of November 2014 in the amount of **\$1,622.00**.

As the Tenant vacated the rental unit in October of 2014, rent was not paid and as such no late fees or N.S.F. fees were incurred. As such, I deny the Landlord's request for compensation for these fees.

The tenancy agreement specifically provides that the Landlord is entitled to liquidated damages. The Landlord conceded that they were willing to accept \$250.00 in liquidated damages and as such I award the Landlord **\$250.00** in liquidated damages.

I accept the Landlord's evidence that the Tenant did not clean the rental unit as required by section 32. The Tenant's obligation is to clean the rental unit to the standard provided in the *Act*, not the same standard as the rental unit was provided to them at the beginning of the tenancy. Accordingly, I award the Landlord the **\$281.40** claimed for repairs and cleaning as well as the **\$99.00** for carpet cleaning.

Section 67 of the *Act* states:

Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations

or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Pursuant to section 67, I find that the Landlord is entitled to \$2,252.40 for the following:

Outstanding rent and utilities for November 2014	\$1,622.00
Liquidated damages	\$250.00
Repairs/cleaning	\$281.40
Carpet Cleaning	\$99.00
Total claimed	\$2,252.40

I find that the Landlord breached section 38 of the *Act* in failing to perform a move out condition inspection in accordance with the *Act* and the *Regulations*. The Landlord failed to provide any evidence that the Tenant was provided a *second* notice in writing for a time to perform the outgoing condition inspection report as required by section 17(2)(b) of the *Residential Tenancy Regulation*. Accordingly, pursuant to section 36(2)(a), the Landlord's right to claim against the security deposit is extinguished.

The Landlord is in the business of renting and therefore, has a duty to abide by the laws pertaining to residential tenancies. The Landlord may only keep all or a portion of the security deposit through the authority of the Act, such as an order from an Arbitrator, or with the written agreement of the Tenant. Here the Landlord did not have any authority under the Act to keep any portion of the security deposit. Therefore, I find that the Landlord is not entitled to retain any portion of the security deposit.

Having made the above findings, I must Order, pursuant to section 38 and 67 of the Act, that the Landlord pay the Tenants the sum of **\$2,380.86**, comprised of double the security deposit (2 x \$1,190.43).

As the Landlord has had mixed success, I deny their request for recovery of the filing fee.

As I have awarded the Landlord the sum of \$2,252.40, this amount is to be set off against the amount owing to the Tenant from the Landlord such that I award the Tenant a Monetary Order in the amount of **\$128.46**. This Order may be filed in the B.C. Provincial Court (Small Claims Division) and enforced as an Order of that Court.

Conclusion

The Tenant breached the fixed term tenancy by ending the tenancy before its term was up.

The Landlord is entitled to recover lost rent and the flat rate utilities for the month of November 2014.

The Landlord's request to compensation for late fees and N.S.F. fees is dismissed.

The Landlord is entitled to \$250.00 as liquidated damages.

The Landlord is entitled to recover the cost of cleaning and repair of the rental unit.

The Landlord, having failed to provide the Tenant with written notice of a second opportunity to inspect the rental unit extinguished their right to claim against the security deposit and as such the Tenant is entitled to return of double the security deposit.

The Landlord's claim for recovery of the filing fee is denied.

The amounts awarded to each party are set off against the other such that the Tenant is entitled to a Monetary Order in the amount of **\$128.46**.

This decision is final and binding on the parties, unless otherwise provided under the Act, 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: August 12, 2015

Residential Tenancy Branch

