



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]

DECISION

Dispute Codes MNDC MNSD FF

This hearing was convened in response to cross-applications by the parties pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

Landlord:

- a monetary order for compensation for loss or damage pursuant to section 67;
- authorization to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Tenant:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord pursuant to section 72.

The hearing was conducted by conference call. All named parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions.

Issues

Is the landlord entitled to a monetary award for compensation for loss or damage?

Is the landlord entitled to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to recover the filing fee for this application from the tenant?

Is the tenant entitled to a monetary award for compensation for loss or damage?
Is the tenant entitled to a return of all or a portion of the security deposit, including double the amount?
Is the tenant entitled to recover the filing fee for this application from the landlord?

Background

A written tenancy agreement was entered into and signed by the parties on September 24, 2015. A copy of the written agreement was provided on file. The tenancy for this apartment unit began on November 1, 2015 with a monthly rent of \$1500.00 plus \$150.00 for parking payable on the 1st day of each month. The tenancy was for an initial fixed term ending on October 31, 2016. The tenant paid a security deposit of \$750.00 at the start of the tenancy which the landlord continues to hold. The tenant provided a forwarding address on March 20, 2016 along with 1 month notice to end the tenancy and vacated the rental unit on April 30, 2016. The landlord's application to retain the security deposit was filed on May 9, 2016 within the time period permitted under the Act.

Evidence & Analysis

Landlord's application:

The landlord is claiming \$750.00 in liquidated damages as the tenant ended the fixed term tenancy early. The landlord submits the tenant initialed the liquidated damages provision in the tenancy agreement and signed the agreement. The landlord submits that the unit was re-rented within 1 week of receiving the tenants notice and prior to the tenant requesting to assign the lease. The landlord testified that the liquidated damages are to cover the administrative costs incurred to re-rent the apartment.

The landlord is also claiming \$86.00 in cleaning fees which the tenant agreed to at the time of the move-out inspection.

The tenant submits that she inquired about the liquidated damages and the time of signing the agreement and was advised by the landlord that it only states the landlord may charge the tenant for liquidated damages. The tenant claims the landlord assured her that they could find someone to take over the lease so it wouldn't be a problem. Further the tenant submits that when she provided her notice to end tenancy she asked if the landlord needed help to find new tenants. When she learned that she

would not be getting her security deposit back she requested the landlord to allow her to assign the tenancy.

The tenant acknowledges signing the move-out condition inspection report agreeing to the \$86.00 cleaning fee. The tenant submits that she did not really agree to the charge but agreed thinking the landlord would deduct it from the security deposit and not charge her the amount on top keeping the security deposit.

The tenancy agreement signed by the parties stipulates the landlord may require the tenant to pay a sum of \$750.00 as liquidated damages if the tenant terminates the tenancy before the end of the fixed term. The tenant's argument that the agreement only states the landlord may is without merit as this wording provides the landlord with discretion to enforce this clause and does not make it invalid.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance to 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 this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting the rental unit after a tenant breach. I find the amount of \$750.00 as being a reasonable pre-estimate of the loss in order to compensate the landlord for any administrative costs incurred in re-renting the unit. I find this amount is not extravagant and does not constitute a penalty.

I also dismiss the tenant's claim that she was denied the opportunity to assign the fixed term lease. The evidence was that the tenant only requested to assign the lease after the landlord had already acted upon the tenant's notice to end the tenancy. In her notice to end tenancy the tenant only offered to help secure new tenants. There is no evidence that the tenant requested to assign the lease before giving her notice to end tenancy and that this request was unreasonably refused by the landlord. The landlord was within their right to secure new tenants as soon as the notice was served by the tenant. I accept the landlord's claim of **\$750.00** in liquidated damages.

As per section 38 of the Act, the landlord is entitled to retain the amount of **\$86.00** in cleaning fees agreed to in writing by the tenant.

As the landlord was successful in this application, I find that the landlord is entitled to recover the **\$100.00** filing fee paid for this application from the tenant.

The landlord continues to hold a security deposit in the amount of \$750.00. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award pursuant to section 38 of the Act.

Total entitlement for Landlord: \$186.00 (\$750.00 + \$86.00 + \$100.00 – \$750.00)

Tenant's application:

The tenant is claiming double the security deposit arguing that the landlord failed to return the security deposit within 15 days of the date the landlord received the tenants forwarding address in writing.

The tenant is claiming \$50.00 as return of a deposit for a key fob.

The tenant is claiming loss of use in the amount of \$450.00. The tenant testified that she did not have use of the storage locker during the first month of the tenancy and she did not have use of a roof-top patio/bar-b-que area as advertised for the entire tenancy.

The landlord agrees that the tenant is entitled to return of the \$50.00 deposit for the key fob.

The landlord testified that the tenant had use of the storage locker and the roof-top patio from day 1 of the tenancy as advertised. The landlord testified that the bar-b-que area and games room did not have advertised availability dates nor were they included in the tenancy contract.

Section 38 of the Act provides that when a tenancy ends, the landlord may only keep a security deposit if the tenant has consented in writing, or the landlord has an order for payment which has not been paid. Otherwise, the landlord must return the deposit, with interest if payable, or make a claim in the form of an Application for Dispute Resolution. Those steps must be taken within fifteen days of the end of the tenancy, or the date the tenant provides a forwarding address in writing, whichever is later.

The landlord filed an application to retain the tenant's security deposit within fifteen days of the end of the tenancy so the tenant's application for double the security deposit is dismissed.

I find the tenant is entitled to **\$50.00** for return of the key fob deposit as agreed to by the landlord.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim on a balance of probabilities. To prove a loss, the applicant must satisfy the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the other party in violation of the *Act*, *Regulation* or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the applicant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I dismiss the tenant's claim for loss of use as the tenant has not provided any proof that the loss exists. With respect to the storage locker, the party's evidence conflicted on whether or not the tenant had use of the storage locker during the first month of the tenancy. The onus is on the tenant to prove the loss exists and the tenant has not provided sufficient evidence in support of her claim. I find on a balance of probabilities that she did have use of the storage locker during the first month. With respect to the loss of use for not having use of the roof-top patio/bar-b-que area and/or games room, I find the tenant has not provided sufficient evidence in proof of the loss or that these items were included in the tenancy agreement or advertised by the landlord as being included and available from the start of the tenancy.

As the tenant was for the most part not successful in her application, I find that the tenant is not entitled to recover the \$100.00 filing fee paid for this application from the landlord.

Total entitlement for Tenant: \$50.00

Offsetting the respective entitlements, I find that the landlord has established a net claim of **\$136.00** (\$186.00 - \$50.00), and I grant the landlord a **monetary order** to that effect.

Conclusion

Pursuant to section 67 of the *Act*, I grant the landlord a Monetary Order in the amount of \$136.00. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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: October 20, 2016

Residential Tenancy Branch