



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### Dispute Codes:

OPN, MNSD, FF

### Introduction

This hearing was convened in response to the Landlord's Application for Dispute Resolution, in which the Landlord has applied for an Order of Possession; to retain all or part of the security deposit; and to recover the fee for filing this Application for Dispute Resolution. It is readily apparent from information on the Application that the Landlord is seeking compensation for liquidated damages, and that matter will be considered at these proceedings.

At the outset of the hearing the Landlord stated that he did not intend to apply for an Order of Possession and that matter will not be considered at these proceedings.

The Landlord stated that on October 04, 2016 the Application for Dispute Resolution and the Notice of Hearing were sent to each Respondent, via registered mail. The Respondent with the initials "D.M.", hereinafter referred to as the Tenant, stated that all three Respondents received these documents and that he is representing the Respondent with the initials "K.H." at the proceedings.

The Landlord submitted 61 pages of evidence to the Residential Tenancy Branch. He stated that all of these documents were served to the Respondents with the Application for Dispute Resolution. The Tenant stated that they only received 33 pages with the Application.

The Landlord was advised that he may refer to any document that he submitted in evidence during the hearing, at which point I will determine whether it was received by the Respondents and whether it should be accepted as evidence for these proceedings.

At the hearing the Tenant acknowledged receipt of the tenancy agreement (document #2) and a notice to end tenancy (document 3) and those documents were accepted as evidence for these proceedings. The Landlord did not refer to any other documents during the proceeding and they were, therefore, not considered during this adjudication.

The parties provided with the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions.

Issue(s) to be Decided

Is the Landlord entitled to liquidated damages and to keep all or part of the security deposit?

Background and Evidence

The Landlord and the Tenant agree that:

- on August 31, 2016 the Landlord, the Tenant, and the Respondent with the initials "A.Z." signed a tenancy agreement;
- the tenancy agreement was a fixed term tenancy agreement, the fixed term of which began on September 01, 2016 and ended on August 31, 2017
- the tenancy agreement required them to pay monthly rent of \$2,065.00;
- a deposit of \$987.50 was paid, which both parties understood would be held as a security deposit;
- item 8 in the tenancy agreement declares, in part, that "Leaving before the expiration of the lease will result in a fee for re-renting the premises of ½ the rent; and
- on September 01, 2016 the Tenants served the Landlord with written notice to end their tenancy by October 31, 2016.

The Landlord stated that the Respondent with the initials "W.K." was present when the rental unit was viewed and when the parties discussed the terms of the tenancy agreement. He stated that this party was not present when they signed the tenancy agreement but he fully expected that party would sign the agreement at a later date.

The Tenant stated that the Respondent with the initials "W.K." was not present when the parties discussed the terms of the tenancy agreement or when the tenancy agreement was signed because he was out of town on those occasions.

The Tenant stated that the rental unit was vacated by September 12, 2016. The Landlord stated that the rental unit was vacated by September 08, 2016 and that it was re-rented for September 15, 2016.

The Landlord is seeking liquidated damages of \$987.50 on the basis of item 8 in the tenancy agreement. The Landlord stated that he estimated the costs of re-renting the unit at ½ the monthly rent because he understands that is industry standard.

The Tenant does not believe they should be required to pay liquidated damages because they ended the tenancy because the rental unit was advertised as a three bedroom unit and the third room did not constitute a bedroom as it did not have a

window. He stated that he did not notice the room did not have a window when the unit was viewed.

The Tenant stated that they informed the Landlord that they were ending the tenancy because the third room did not have a window, in writing, when they served the Landlord with notice to end the tenancy.

The Tenant stated that there were other reasons they wished to end the tenancy, although they were not brought to the attention of the Landlord, in writing. As these perceived deficiencies were not brought to the attention of the Landlord, in writing, the Tenant was not permitted to discuss these allegations at the hearing.

### Analysis

On the basis of the undisputed evidence I find that the Landlord, the Tenant, and the Respondent with the initials "A.Z." entered into a fixed term tenancy agreement, the fixed term of which ended on August 31, 2017. I therefore find that all three of those individuals were required to comply with the terms of that agreement.

I find that there is insufficient evidence to establish that the Respondent with the initials "W.K." entered into a fixed term tenancy agreement with the Landlord. In reaching this conclusion I was influenced by the absence of evidence to corroborate the Landlord's testimony that this party was present when the terms of the agreement were discussed or to refute the Tenant's testimony that he was not present during those discussions.

In determining that there is insufficient evidence to establish that the Respondent with the initials "A.Z." entered into a fixed term tenancy agreement, I was also heavily influenced by the fact he has not signed the tenancy agreement. As there is insufficient evidence to establish that this party entered into a fixed term tenancy agreement, I cannot conclude that this party was required to comply with the terms of that agreement and I dismiss the Landlord's claim for a monetary Order naming this party.

Section 45(2) of the *Residential Tenancy Act (Act)* stipulates 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; is not 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, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

I find that the Tenants did not comply with section 45(2) of the *Act* when they ended this fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement.

Section 45(3) of the *Act* stipulates that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable

period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I find that the Tenants knew, or should have known, after viewing the unit that there was no window in the room advertised as the third bedroom. I therefore cannot conclude that having a window in this room is a material term of the tenancy agreement as the Landlord did not offer a third bedroom with a window and the Tenants could have had no reasonable expectation of a window. As having a window in this room cannot be considered a material term of the tenancy agreement, I find the Tenants did not have the right to end this tenancy, pursuant to section 45(3) of the *Act*, simply because of there was no window.

Regardless of whether there were other deficiencies with the rental unit I find that the Tenants did not have the right to end this tenancy, pursuant to section 45(3) of the *Act*, because they did not bring those issues to the attention of the Landlord, in writing.

I find that there is a liquidated damages clause in the tenancy agreement that requires the Tenants to pay \$987.50 to the Landlord if they prematurely end this fixed term tenancy. 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 of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that \$987.50 is a reasonable estimate given the expense of advertising a rental unit; the time a landlord must spend showing the rental unit and screening potential tenants; and the wear and tear that moving causes to residential property. When the amount of liquidated damages agreed upon is reasonable, a tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally liquidated damage clauses will only be struck down when they are oppressive to the party having to pay the stipulated sum, which I do not find to be the case in these circumstances. On this basis, I find that the Landlord is entitled to collect liquidated damages of \$987.50.

I find that the Landlord's application has merit and that the Landlord is entitled to recover the fee for filing this Application for Dispute Resolution.

### Conclusion

I find that the Landlord has established a monetary claim, in the amount of \$1,087.50, which is comprised of \$987.50 in liquidated damages and \$100.00 for the filing fee. Pursuant to section 72(1) of the *Act*, I authorize the Landlord to retain the security deposit of \$987.50 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$100.00. In the event that the Tenants do not comply with this Order, it may be served on the Tenants, filed with the Province of British Columbia 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: April 04, 2017

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Residential Tenancy Branch