



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, MND, MNR, FF (Landlord's Application)
 MNSD, MNDC, FF (Tenant's Application)

Introduction

This hearing convened as a result of cross applications. In the Landlords' Application filed July 11, 2017 the Landlords claimed monetary compensation from the Tenants for damage to the rental unit and unpaid rent, authority to retain the Tenant's security deposit and recovery of the filing fee. In the Tenants' Application for Dispute Resolution filed December 6, 2017 the Tenants claimed monetary compensation from the Landlords return of their security deposit and recovery of the filing fee.

The hearing was conducted by teleconference on January 9, 2018. Both parties called into the hearing and were given a full opportunity to be heard, to present their affirmed testimony, to present their evidence orally and in written and documentary form, 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 *Residential Tenancy Branch Rules of Procedure*. However, not all details of the respective submissions and or arguments are reproduced here; further, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Are either of the parties entitled to monetary compensation from the other?

2. What should happen with the Tenants' security deposit?
3. Should either party recover the filing fee?

Background and Evidence

Introduced in evidence was a copy of the tenancy agreement providing as follows: this one year fixed term tenancy began December 1, 2016 and was to end November 30, 2017; rent was \$2,250.00 per month; and, the Tenants paid a security deposit in the amount of \$1,125.00. The parties agreed that this was the second fixed term tenancy entered into by the parties.

The Landlord, B.L., testified. He stated that the Tenants moved from the rental unit prior to the expiration of the fixed term and submitted that pursuant to clause 5 of the agreement the Tenants were obligated to pay \$500.00 in liquidated damages.

Although the Landlords also claimed the cost to refinish the flooring and an unpaid water bill, B.L. confirmed at the hearing that the Landlords were not seeing compensation for these amounts. In addition to the \$500.00 for liquidated damages, the Landlords sought \$100.00 for recovery of the filing fee and \$10.50 for registered mail costs.

In response to the Landlords' claims, the Tenants submitted as follows.

They disputed the liquidated damages on the basis that the Tenants believe the clause was a penalty for ending the tenancy early. The Tenants also noted that they gave the Landlords four months' notice of their intention to move out and that the Landlords agreed they could. Introduced in evidence by the tenants was an email from the Landlords dated March 15, 2017 wherein the Landlords write as follows:

We are in agreement with all the details of your departure on June 30, 2017, except for the issue of what form needs to be signed. The good news is that your letter dated March 1, 2017 suffices as the standing legal document in situations where the tenant requests an early end of tenancy. So we don't need to complete the form you forwarded us, nor the one we forwarded you. You do not require the Mutual Agreement form, by law, to end your tenancy early, and we are in complete agreement with your requested date of departure. We do not require the Acknowledgement of Early End of Tenancy Notice, by law, to go ahead and rent our home. Your tenancy will end on June 30, 2017, and we will begin advertising our home immediately, with the hopes of securing tenants for July 1st, 2017. It is our legal obligation as landlords to handle the rental of this property, so your subletting our home is not anything you need to be concerned about, nor will we be granting our permission to do so, based on the fact we are complying with your request to end the tenancy early. We wanted to make sure we were not

The Tenants also submit that the Landlords did not suffer any losses as they rented the rental unit out for \$400.00 more a month such that they made an additional \$2,000.00 and were therefore better off after the tenancy ended.

In their Application, the Tenants claimed double the security deposit. The Tenants allege that the Landlords claim for the \$500.00 was frivolous such that they should be entitled to return of double the deposit as the Landlords should have simply returned the funds to them. They also claimed staff at the RTB told them the LL should have returned the funds and then made an application.

The Tenants also sought compensation for \$1,452.08 representing the increase in rent they paid after entering into the second fixed term tenancy. They submitted that the rent amount charged by the Landlords when they entered into the new agreement was illegal as it was over 13% more than they had previously paid, rather than the permitted 2.9% increase at that time. The Tenants further alleged they were "backed into a corner" in terms of agreeing to the amounts the Landlords sought as they had no choice but to sign on for another fixed term as there were no other rentals in the community in which the rental unit was located.

The Tenants also sought recover of the sum of \$384.22 for the heating oil which they say remained in the tank at the time they moved out. During the hearing the Landlords confirmed they were agreeable to reimbursing the Tenants this amount.

In response to the Tenants submissions regarding the liquidated damages clause, B.L. stated that the Landlords did not rescind their right to claim for liquidated damages. He stated they were not a penalty, but a reasonable estimate.

The Landlords also submitted that the parties entered into a new agreement because the Tenants brought in students, from which they received rental income. The Landlords submitted that when the Tenants brought in students the number of occupants went up from two adults to four.

The Tenants testified that they were responsible for housing, feeding and entertaining the students such that the students were part of their family.

Analysis

After consideration of the evidence and testimony before me and on a balance of probabilities I find as follows.

The parties disagree as to the enforceability of the liquidated damages clause in the tenancy agreement. Guidance can be found in the B.C. Supreme Court decision of *Super Save Disposal Inc. v. Blazin Auto Ltd.*, 2011 BCSC 1784 in which the court held as follows:

It is well settled that the enforceability of such a term turns on whether it is a genuine pre-estimate of the expected loss that a party will sustain in the event of a breach of contract or a penalty clause so oppressive or unreasonable that equitable intervention is justified to prevent an injustice.

..

Judicial interference with a liquidated damages provision will be justified if enforcement of the term results in payment of a sum which is extravagant and unconscionable in comparison with the greatest loss that could conceivably be proved to have followed from the breach: 32262 *B.C. v. See-Rite Optical, supra*, at para. 13.

Conversely, a liquidated damages provision is more likely to be enforced where the claim approximates the amount to which the claimant would otherwise have been entitled according to principles of general contract law: 32262 *B.C. v. See-Rite Optical, supra*, at para. 16 to 18.

The onus of establishing that a stipulated sum is a penalty rather than a genuine pre-estimate of damages that the parties have agreed in advance will be sustained in the event of a breach of the contract, rests on the party against whom the stipulated sum is claimed.”

As noted, the Tenants bear the burden of proving the liquidated damages are a penalty, and in this case I find they have failed to meet this burden. In this case, I find the \$500.00 to be a genuine pre-estimate of the expected loss rather than a penalty. Although the Landlords were able to re-rent the unit at a higher monthly amount and did not suffer a loss of rent, this does not preclude them from seeking payment of the liquidated damages pursuant to the strict terms of the agreement. The Landlords

could have just as easily incurred substantial costs to re-rent, advertise, and loss of rent. At the time the parties entered into the agreement they agreed that \$500.00 was a reasonable sum and I find they are bound by this agreement.

I also accept the Landlords' evidence that even though they agreed the Tenants could move out early, that did not preclude them from pursuing their right to the liquidated damages agreed to by the parties when they entered into the tenancy agreement. The "Acknowledgement of Early End of Tenancy Notice" filed in evidence, although only signed by the Landlords, confirms they did not agree to waive this entitlement.

I therefore find the Landlords are entitled to claim the \$500.00 liquidated damages.

The Landlords seek compensation for the cost of registered mail.

Section 72 of the *Act* allows for repayment of fees for starting dispute resolution proceedings and charged by the Residential Tenancy Branch. While provisions regarding costs are provided for in Supreme Court Proceedings, they are specifically not included in the *Act*. I conclude that this exclusion is intentional and includes disbursement costs such as registered mailing costs. I therefore dismiss the Landlord's claim for recovery of these costs.

The Tenants seek return of double the security deposit on the basis they believe the Landlords' application for liquidated damages was frivolous. I disagree for the reasons set forth previously in this decision as well as section 38 of the *Act*.

Section 38(1) provides that a landlord must either make an application for dispute resolution or return the security deposit within 15 days of receipt of the tenant's forwarding address. In this case the Landlords made their application within the 15 days prescribed by 38(1) and as such the Tenants are not entitled to return of double their deposit.

The Tenants also seek compensation for the increased rent paid under the second fixed term tenancy. While recent changes to the *Residential Tenancy Act* affect the enforceability of fixed term tenancies, at the time the parties entered into the second tenancy and at the time that the first and second tenancies ended, those changes were not in force. In any case, while rental accommodation may be scarce in some communities and may cause renters to feel "backed into a corner" as alleged by these Tenants, the evidence does not support a finding that the Tenants entered into the agreement under duress and therefore does not affect the enforceability of the residential tenancy agreement. The Tenants chose to enter into a second fixed term tenancy and agreed to pay the rent requested by the Landlord. This was a new tenancy

and not a rent increase; therefore the restrictions on rent increases as provided for in the *Act* and *Regulations*, do not apply.

The Tenants request for reimbursement of the \$384.22 was agreed to by the Landlords. I therefore record that agreement pursuant to section 63 of the *Act*.

As the parties have enjoyed divided success I find they shall each bear the cost of their filing fees.

The \$500.00 awarded to the Landlords shall be offset against the \$384.22 awarded to the Tenants such that I find the Landlords are entitled to the sum of \$115.78.

Conclusion

Each party shall bear the cost of their own filing fee.

The Landlords' claim for \$500.00 in liquidated damages is granted.

The Landlords' claim for recovery of the registered mail costs is dismissed.

The balance of the Landlords' claims are recorded as being withdrawn.

The Tenants' claim for return of double their security deposit and recovery of rent paid pursuant to an alleged illegal rent increase is dismissed.

The Tenants' claim for compensation for the heating oil in the amount of \$384.22 was agreed to by the Landlords.

The \$500.00 awarded to the Landlords and the \$384.22 awarded to the Tenants are to be set off against one another. The Landlords are entitled to the balance due in the amount of \$115.78.

Pursuant to sections 38, 67 and 72 of the *Act*, I authorize the Landlords to retain \$115.78 from the Tenants \$1,125.00 security deposit and I award the Tenants return of the balance in the amount of **\$1,009.22. In furtherance of this my Decision, I grant the Tenants a Monetary Order in the amount of \$1,009.22.** This Order must be served on the Landlords and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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: January 12, 2018

Residential Tenancy Branch