



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding COLUMBIA PROPERTY MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MND MNDC MNSD FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* ("the Act"). The landlord applied pursuant to the *Residential Tenancy Act* ("the Act") for: a monetary order for unpaid rent pursuant to section 67; authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee for this application from the tenants pursuant to section 72.

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

Both parties attended and were given a chance to testify, make submissions and participate in this hearing. The landlord was represented by two individuals (Landlord KB and Landlord AM) and Tenant SH represented both tenants at this hearing.

Issue(s) to be Decided

Is the landlord or are the tenants entitled to a monetary order against the other party? Is the landlord entitled to retain all or a portion of the tenants' security deposit in partial satisfaction of a monetary order or are the tenants entitled to the return of their security deposit? Is either party entitled to recover the \$100.00 filing fee for their application?

Background and Evidence

This tenancy began on January 27, 2017 with a rental amount of \$1400.00 payable on the 1st of each month. A copy of a tenancy agreement signed January 27, 2017 was submitted as evidence for this hearing. The tenancy was scheduled as a one year tenancy to end on January 31, 2018. The tenants gave notice to the landlord on June 28, 2017 that they intended to vacate the rental unit. The tenants vacated, providing their keys and their forwarding address on July 31, 2017.

The landlord testified that the tenants left holes in the wall, that the unit required cleaning and that the tenants broke their one year lease. The landlord sought to recover \$500.00 towards the cleaning (\$50.00), the repairs (\$50.00) and the \$300.00 lease break fee, as laid out in the residential tenancy agreement addendum signed and initialed by both parties. The lease breaking term in this residential tenancy agreement reads,

If the tenant terminates the tenancy before the end of the original term, the Landlord may, at the Landlord's option, treat his Tenancy Agreement as being at an end. In such event, the sum of \$300.00 shall be paid by the Tenant to the landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the said premises. The Landlord and Tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the landlord from exercising the further right of pursuing another remedy available in law or equity, including, but not limited to, damages to the premises and damages as a result of loss of rental income due to the Tenant's breach of the terms of this agreement.

The tenant attending at this hearing (Tenant SH) acknowledged that he and his co-tenant broke the lease. Tenant SH testified that he did not agree to the lease break fee. He testified that he assisted in getting new tenants for the rental unit and that therefore there was no real loss for the landlord. Tenant SH testified that it was the movers (at move-in) who did the wall damage in the residence and he repaired that damage by patching it prior to move-out. He referred to a photograph in evidence showing patch work on the wall where he had patched the hole. Tenant SH testified that, given the opportunity, he would have made repairs to the walls and painted himself in order to avoid the \$50.00 fee charged by the landlord.

Tenant SH also testified that he and his co-tenant/wife cleaned the rental unit to the best of their ability. He testified that his wife spent more than one full day cleaning prior

to the move out and that the both of them did more cleaning after move-out. He also noted that, in the area where they were living, large and long burning forest fires in the summer had led to a regular deposit of soot and smoke remnants in most people's homes. Tenant H stated that he does not feel that they should be charged for additional cleaning – he submitted that the landlord's standards are just too high.

The landlord provided a monetary worksheet providing a breakdown of the monetary amount the landlord sought to recover from the tenants.

Item	Amount
Breach lease	\$300.00
Cleaning	50.00
Repairs (holes in wall – repaint)	50.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Amount sought by Landlord	\$500.00

The landlord submitted photographs showing some dirty cupboards and some holes in the wall and uncleaned appliances. The landlord's representative AM testified that she spent at least half of one day on cleaning. The landlord's representative KB testified that the landlords are not seeking the full amount of their cleaning costs. The landlord indicated that the next tenants in this rental unit already resided at the residential premises and had been waiting on a larger unit.

The tenants requested a monetary order as follows,

Item	Amount
Security Deposit (\$700.00) x 2	\$1400.00
Cost of photographs	40.00
Work Time Lost, Defamation	1000.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Amount sought by Tenant	\$2,540.00

The tenants sought to recover their full security deposit from the landlord as well as an additional amount equal to their security deposit. Tenant SH argued that the landlord did not apply within 15 days to retain their deposit. The tenants also sought to recover their filing fee, cost of photographs supplied for this hearing, work hours lost to attend and prepare for this hearing as well as "defamation" because the landlords had accused them of leaving the rental unit in poor condition.

Analysis

While I have turned my mind to all the documentary evidence, including photographs, miscellaneous documents and the testimony of all the parties at this hearing, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the party's submissions and my findings around each issue are set out below.

I dismiss the tenants' portion of their application with respect to compensation by the landlord for his time lost at work to both prepare and attend this hearing in the amount of \$1000.00 as well as the \$40.00 cost of printing photographs to submit as evidence for this hearing and "defamation". Compensation regarding "defamation" is not covered under the *Residential Tenancy Act* and therefore I dismiss any portion of the tenants' claim relating to "defamation". The *Act* also does not allow me to order any costs beyond the filing fee cost for this application: the printing and loss of wages portion of the tenants' application are essentially administrative costs or costs as a result of pursuing their claim and I cannot order the landlord to pay this type of compensation to the tenants.

Tenant SH argued that he should be entitled to double the amount of his security deposit as a result of the landlord's failure to apply within the allowable timeline under the *Act* to apply to retain the tenants' deposit. Section 38(1) of the *Act* requires a landlord, within 15 days of the end of the tenancy or the date on which the landlord receives the tenant's forwarding address in writing, to either return the security deposit in full or file an Application for Dispute Resolution seeking an Order allowing the landlord to retain the deposit. If the landlord fails to comply with section 38(1), then the landlord may not make a claim against the deposit, and the landlord must return the tenant's security deposit plus any applicable interest and must also pay the tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*).

With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the tenants' provision of the forwarding address. In this case, the landlord was informed of the forwarding address on the same day that the tenants vacated the rental unit: July 31, 2017. Therefore, the landlord had 15 days after July 31, 2017 to take one of the actions outlined above. The landlord made their application on August 10, 2017 - within the 15 day allowable time period to apply to retain the deposit. Based on the landlord's application within the timeline, I find that the tenants are not entitled to an amount doubling his security deposit, in these circumstances. I

dismiss their application for an amount equivalent to their security deposit pursuant to section 38 of the Act.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss (in this case, the landlord) bears the burden of proof.

To receive compensation from the tenants at the end of this tenancy, the landlord must prove the existence of damage or loss. I find that the landlord has proven damage by the provision of the condition inspection report as well as photographic evidence that accurately reflects the landlord's testimony at this hearing. The condition inspection report provides clear evidence that some cleaning was just not completed. I find that the landlord was required to clean to ensure that the rental unit was sufficiently tidy and clean for the next tenants (who were, incidentally, moving in immediately). I also find that the photographs identify the need to paint the rental unit at the end of the tenancy. While the tenant patched damage to the wall, he did not paint or pay a cost towards painting the area where the damage had occurred. Tenant SH acknowledged there was some rush at the end of the tenancy.

According to Residential Tenancy Regulation No. 21 as laid out below, the condition inspection report is the best evidence of the condition of the unit unless proven otherwise,

- 21** In dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary.

The landlord must prove that the damage/loss stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. The landlord's invoices provided an accounting of the cost of the damage. I accept the testimony of the landlord that they have provided mitigated and reasonable costs to the tenant with respect to cleaning the rental unit and painting to cover the patchwork. Therefore, with respect to the additional clean, I find that the landlord is entitled to recover \$50.00. And with respect to the painting, I find that the landlord is entitled to recover \$50.00.

The final portion of the landlord's claim consists of the \$300.00 lease break fee. The landlords submitted that this amount is intended to cover losses incurred by the landlord

in re-renting the unit. It is important to note that such a fee is not intended to be a penalty but merely to ensure that the landlord is not out of pocket for expenses incurred as a result of the actions of the tenant.

Tenant SH argued that the \$300.00 amount is too high – he argued that it is a penalty and that the landlord did not have costs of \$300.00. I accept Tenant SH's that the landlord's costs to re-rent were reduced as the next tenants had already been vetted and lived in the rental unit however I also accept the rebuttal by the landlord that they had to rent the other unit within the residential premises.

Policy Guideline No. 4 provides guidance with respect to claims by the landlord for liquidated damages including lease breaking fees,

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 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 considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

The Policy Guideline provides a variety of considerations in determining if a liquidated damages clause is being used as a penalty. Among the considerations is, as stated in the guideline, "[if] an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty." The tenants provided a vacate notice one month prior to their move out but also prior to the end of the agreed-to fixed term tenancy.

The residential tenancy agreement is clear that this tenancy was intended to continue for 1 year from February 1, 2017. Residential Tenancy Policy Guideline No. 30 provides direction on the definition and terms of a fixed term tenancy as used in section 44 of the Act:

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date...

A fixed term tenancy creates security for both parties to the agreement. Based on all of the evidence submitted at this hearing, the tenants breached the conditions of the residential tenancy agreement and should therefore be required to pay a lease break

fee. I accept the undisputed testimony of the landlord that the tenant ended the tenancy prior to its end date without an agreement with the landlord to do so as required by the legislation and that, while current occupants of the residential premises moved in to the rental unit immediately, the landlord still had costs associated with finding a tenant for the empty rental unit in advertising and other costs associated with entering into a new tenancy agreement. I find that the \$300.00 is a reasonable cost associated with the re-renting of a unit and that the tenants clearly agreed to this cost at the start of their tenancy when they signed the agreement and initialled the lease breaking provision with the fee amount provided. Therefore, I find that the landlord is entitled to the \$300.00 lease break fee.

In accordance with section 72, I find that the landlord is entitled to retain the tenants' security deposit and any interest payable towards the monetary amount below. There is no interest payable. As both parties were partially successful in their applications, I find that the parties are responsible for their own filing fees.

The tenants' security deposit will be addressed as follows,

Item	Amount
Tenants' Security Deposit	\$700.00
Less Landlord's Cleaning costs	-50.00
Less Landlord's Painting costs	-50.00
Less Landlord's Lease Break Fee	-300.00
Total Monetary Order to Tenants	\$300.00

Conclusion

Pursuant to section 72 of the Act, the landlord is entitled to retain \$500.00 of the tenants' security deposit.

The tenants are entitled to a monetary order in the amount of \$300.00 for the remainder of their security deposit.

The tenants are provided with this Order in the above terms and the landlord must be served with this Order as soon as possible. Should the landlord 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: February 28, 2018

Residential Tenancy Branch