



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOLLYBURN PROPERTIES LIMITED
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FFT, MNDCL-S, MNRL-S, FFL

Introduction

This hearing involved cross applications made by the parties. On April 17, 2018, the Tenant made an Application for Dispute Resolution seeking a Monetary Order for a return of double the security deposit pursuant to section 38 of the *Act* and seeking to recover the filing fee pursuant to section 72 of the *Act*.

On May 1, 2018, the Landlord made an Application for Dispute Resolution seeking a Monetary Order for lost rent, seeking a Monetary Order for compensation for liquidated damages, and to apply the security deposit towards this debt, pursuant to section 67 of the *Act*. The Landlord is also seeking to recover the filing fee pursuant to section 72 of the *Act*.

M.B. attended the hearing on behalf of the Tenant and K.H. attended the hearing on behalf of the Landlord. All in attendance provided a solemn affirmation.

M.B. advised that she served the Notice of Hearing package to the Landlord by registered mail, and the Landlord confirmed receipt of this package. K.H. advised that he served the Notice of Hearing package to the Tenant's forwarding address in writing by registered mail (the tracking number is attached to the first page of this decision). However, M.B. advised that the Tenant lives out of country and she was not able to pick up this package for him. As such, the package went unclaimed. Based on this testimony, and in accordance with sections 89 and 90 of the *Act*, I am satisfied that the Tenant was deemed served with the Landlord's Notice of Hearing package.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a return of double his security deposit pursuant to section 38 of the *Act*?
- Is the Tenant entitled to recover the filing fee pursuant to section 72 of the *Act*?
- Is the Landlord entitled to a monetary award for unpaid rent and to apply the deposit towards this debt, pursuant to section 67 of the *Act*?
- Is the Landlord entitled to a monetary award for liquidated damages and to apply the deposit towards this debt, pursuant to section 67 of the *Act*?
- Is the Landlord entitled to recover the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

K.H. stated that the tenancy started on May 1, 2017 as a fixed term tenancy for a period of one year. Rent was established at \$2,052.00 per month, due on the first day of each month. A security deposit of \$1,026.00 was also paid. M.B. confirmed these details.

K.H. and M.B. confirmed that the Tenant gave notice to end his Tenancy in mid-February and that a move out inspection was conducted on February 28, 2018; however, the Tenant did not sign the inspection report. Both parties agreed that a forwarding address in writing was provided by the Tenant on February 15, 2018 as an attachment to an email sent to the Landlord.

K.H. advised that finding a new Tenant on such short notice is difficult and he provided into written evidence a tenancy agreement for the next tenant, that commenced April 1, 2018. The Landlord is seeking lost rent for the month of March 2018 of \$2,052.00 and liquidated damages in the amount of \$805.33. He also stated that he was not the property manager at the time, but he assumed that the security deposit was not dealt with, in accordance with the *Act*, by previous administration as these fees were still outstanding.

M.B. acknowledged that the Tenant likely knew of the liquidated damages clause in the tenancy agreement. She also advised that the Tenant had friends in the building who made him aware that the next tenant may have moved into the rental unit mid-March, not April 1, 2018.

Analysis

Section 38(1) of the *Act* requires the 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 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 and must 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 Tenant's provision of the forwarding address.

I accept that the Tenant's forwarding address in writing was provided to the Landlord in an email dated February 15, 2018. However, as the Tenant vacated the rental unit on February 28, 2018, I find that this is the date which initiated the 15-day time limit for the Landlord to deal with the deposit. The undisputed evidence before me is that the Landlord did not return the security deposit in full within 15 days of February 28, 2018 and only initiated their Application on May 1, 2018. As the Landlord has not complied with the requirements of the *Act*, I am satisfied that the Tenant has established a claim for double the security deposit. As such, I grant the Tenant a Monetary Order in the amount of \$2,052.00 for this portion of the claim.

With respect to the Landlord's Application, I find it important to note that Policy Guideline # 4 states that 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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- 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.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

Based on the evidence before me, I am satisfied that there was a liquidated damages clause in the tenancy agreement that both parties had agreed to, and that the genuine pre-estimate of loss does not meet the tests for establishing this amount as a penalty. Furthermore, the policy guideline states that "If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent." In this instance, I find that ending a tenancy with such short notice would put the Landlord in a position where efforts to re-rent the premises would be considered sufficiently more than "negligible or non-existent". With respect to M.B.'s argument that the Landlord re-rented this unit in mid-March, K.H. stated that their company policy would not allow a tenant to move in earlier, contrary to their tenancy agreement, and the evidence I have before me is of the tenancy agreement for this next tenant commencing April 1, 2018. As such, I am satisfied that the Landlord mitigated their losses, that the Landlord suffered a loss of March rent, and that the Landlord has sufficiently established this claim. As such, I grant a Monetary Order in the amount of \$2,857.33 for rent owing for the month of March 2018 and the liquidated damages.

As the Tenant was successful in their application, I find that the Tenant is entitled to recover the \$100.00 filing fee paid for this application. 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. Under the offsetting provisions of section 72 of the *Act*, I find that the filing fees cancel each other out. However, under these provisions, I offset the Tenant's award from the Landlord's and I grant the Landlord a Monetary Order of \$805.33 in full satisfaction of the liquidated damages debt.

Conclusion

I provide the Landlord with a Monetary Order in the amount of \$805.33 in the above terms, and the Tenant must be served with **this Order** as soon as possible. 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: June 13, 2018

Residential Tenancy Branch