



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNSD FFL MNDCLS MNDLS MNRLS

Introduction

This hearing dealt with applications from both the landlords and the tenant under the *Residential Tenancy Act* (the *Act*).

The landlords applied for:

- a monetary order for unpaid rent, damages and loss pursuant to section 67; and
- an order to recover the filing fee for their application from the tenant pursuant to section 72.

The tenant applied for:

- authorization to obtain a return of all or a portion of the security deposit pursuant to section 38; and
- an order to recover the filing fee for their application from the landlords pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, and to call witnesses. The landlord BVB (the “landlord”) confirmed she represented both named co-tenants and was assisted by the property manager TD.

As both parties were present service of documents was confirmed. The landlord testified that they were served with the tenant’s application for dispute resolution and evidence. The tenant testified that they were served with the landlord’s application for dispute resolution and evidence. Based on the undisputed testimonies of the parties I find that they were served with the respective materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to a monetary award as claimed?

Is the tenant entitled to a return of all or part of the security deposit for this tenancy?

Is either party entitled to recover the filing fee for their application from the other?

Background and Evidence

The parties agreed on the following facts. This fixed-term tenancy began in September, 2012 and was scheduled to end May 31, 2018. The tenant gave written notice on October 4, 2017 and the tenancy ended on October 31, 2017. The monthly rent was \$1,500.00 payable on the first of each month. A security deposit of \$725.00 was paid at the start of the tenancy and is still held by the landlord along with a \$200.00 deposit for transmitter and keys. The parties participated in a condition inspection report both at the start and end of the tenancy.

The tenant disagreed with the landlord's assessment of the rental unit condition at the move-out inspection and refused to sign the inspection report. The tenant did provide their forwarding address on the move-out condition inspection report of October 31, 2017.

The landlord seeks a monetary award in the amount \$1,991.35 for the following items:

Item	Amount
Unpaid Rent (Nov 1-Nov 15)	\$750.00
Cost of Repairs	\$474.40
Carpet Cleaning	\$125.95
Liquidated Damages	\$641.00
TOTAL	\$1,991.35

The landlord said that upon received the tenant's notice that they would be ending the tenancy early they advertised the suite and found a new occupant to take possession as of November 15, 2017. The tenant paid the full rent through October 31, 2017. The landlord seeks the equivalent of half a month's rent for the period that the suite was unoccupied due to the tenant's insufficient notice.

The landlord seeks the cost of repairs and cleaning to the rental unit. The landlord submitted into written evidence copies of invoices for the work done to the rental unit. The items for which invoices were provided include; cleaning of windows, plumbing work for the bathroom, replacing light bulbs, replacing the glass for the stove, and replacing a sink stopper.

The landlord seeks the cost of carpet cleaning for the rental unit and provided an invoice for the cost of cleaning.

The landlord seeks an amount of \$641.00 for what the landlord calls liquidated damages. The landlord submits that Paragraph 5 of their tenancy agreement provides that they may charge the cost of finding a new tenant. The pertinent portions of the agreement read:

In either event, the Landlord is legally entitled to charge **compensation as Liquidated Damages** for incurred advertising costs and his time involved in numerous interviews, traveling, showings, paperwork etc. An appropriate amount will be calculated and deducted from the Damage Deposit. **Some circumstances may require to involve a “Leasing Agency” to find a new tenant.** The departing tenant is liable for the Agency's usual fees. **This compensation is not a penalty and is allowed under the Tenancy Act.**

The landlord has submitted a breakdown of the costs they consider were incurred as Liquidated Damages. These include the cost of advertising, the landlord's time to interview and show the suite to potential tenants calculated at \$30.00/hour, the cost of an agent from the property management company attending the move-out inspection, and the hearing, and the cost of filing the present application.

The tenant submits that the landlord could have found a new tenant to occupy the suite for November 1, 2017. The tenant further submits that the new tenancy agreement is for a monthly rent of \$1,800.00 so the landlord is not experiencing a loss. The tenant said that the landlord could have charged a higher rent for the new tenancy and mitigated their losses further but chose not to do so.

The tenant disagrees with the landlord's assessment of damage to the rental unit and the costs the landlord claims were incurred to make repairs. The tenant submits that

the glass on the oven door was broken earlier during the tenancy and the landlord failed to make repairs at that time. The tenant submits that the cost of the replacement lightbulbs the landlord is charging is disproportionately higher than the actual retail costs.

At the hearing the tenant did agree with the cost of carpet cleaning. The tenant testified that they had discussed the cost of carpet cleaning and they had agreed that the landlord may arrange for cleaning.

The tenant disagrees with the costs the landlord claims are liquidated damages. The tenant doubts the time claimed as an accurate record of the time it would take to list, vet and re-rent the suite. The tenant submits that in any event the landlord has not incurred a loss as they have found a new tenant at a higher monthly rent, therefore no charges should be applied against the tenant.

Analysis

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing. If that does not occur, the landlord must pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit. However, this provision does not apply if the landlord has obtained the tenant's written permission to keep all or a portion of the security deposit as per section 38(4)(a).

In the present matter the parties gave evidence that the tenant provided the landlord with a forwarding address in writing on the last day of the tenancy, October 31, 2017. The tenant did not provide written authorization that the landlord may retain any portion of the deposits for this tenancy. The landlord filed an application for dispute resolution on November 9, 2017, however their application does not include an order that they be authorized to retain the security deposit. While the landlord indicates in the description of the issues that they are holding a security or pet damage deposit, they do not make a specific application to retain the deposit as required under the *Act*.

I find that the landlord did not return the security deposit of \$725.00 for this tenancy nor did they file an application to retain the security deposit within the 15 days provided under the *Act*. As a result I find that the tenant is entitled to a monetary award in the

amount of \$1,450.00, double the security deposit paid for this tenancy. No interest is payable over this period.

I also find that the landlord is holding the tenant's \$200.00 deposit for key and transmitter and order that it be returned to the tenant as well.

Section 67 of the *Act* allows me to issue a monetary award for loss resulting from a party violating the *Act*, regulations or a tenancy agreement. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. The claimant also has a duty to take reasonable steps to mitigate their loss.

Section 45(2) of the *Act* explains that a tenant may end a fixed term tenancy by giving the landlord notice effective on a date not earlier than one month after the date the landlord receives the notice.

Section 7 of the *Act* explains, "If a tenant does not comply with this *Act*, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... A landlord who claims compensation for damage or loss that results from the other's non-compliance with this *Act*, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss."

This issue is expanded upon in *Residential Tenancy Policy Guideline #5* which explains that, "Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect."

I find that, as the tenant gave notice of their intention to end the tenancy on October 4, 2017 the effective date of the end of tenancy was November 30, 2017. I find that the tenant was obligated to pay the monthly rent in the amount of \$1,500.00 on November 1, 2017. I accept the evidence of the parties that the tenant failed to pay the full rent on that date.

The tenant submits that the landlord, by entering into a new agreement at a higher monthly rate, suffered no losses for the early end of the tenancy. The tenant further submits that the landlord failed to adequately mitigate their loss as they contracted for a lower rental rate than one could have conceivably charged for the rental unit.

The landlord claims the amount of \$750.00 representing the period of November 1-15, the duration that the rental unit was unoccupied. While I accept the evidence that the landlord suffered some loss as a result of the tenant's departure without a full month's notice the evidence provided is that there is a new tenancy with a higher monthly rent. The landlord testified that they received the amount of \$925.00 for the period of November 15-30 from the new tenant.

I do not find the tenant's submission that the landlord is obligated to charge the highest possible rent in order to properly mitigate their losses to be persuasive. A party must take reasonable steps to mitigate their damages. I find that an obligation to charge the highest possible rental rate goes beyond reasonable measures. In the present circumstances, I find that the landlord is charging a rental rent that is 20% above that which was being charged to the tenant. I find this rent increase to be more than sufficient mitigation of their losses.

The tenant submits that the landlord could have accepted a new tenant who would have been able to start their tenancy on November 1, 2017. I find that there is insufficient evidence in support of the tenant's submission on this point. I find that a new tenancy commencing in mid-November after the tenant had provided notice on October 4, 2017 to be reasonable.

Based on the evidence of the parties I find that the landlord suffered some rental losses as a result of the tenant providing less than one month's notice that the tenancy would be ended. I find that the tenant was obligated to pay the monthly rent in the amount of \$1,500.00 for November 1, 2017. I accept the undisputed evidence that the landlord found a new tenant to occupy the suite who paid \$925.00 for the period that they occupied the suite in November. Accordingly I find that the landlord is entitled to a monetary award in the amount of \$575.00 representing the lost rental income for the month of November, 2017.

I accept the landlord's evidence in support of their claim for cleaning and repairs to the rental unit. The tenant testified that they agreed with the cost of carpet cleaning in the amount of \$125.95. The tenant said that they had initially agreed with some of the damages claimed by the landlord at the time of the move-out inspection though the amount assessed at that time was \$140.00. The photographs and condition inspection report submitted into written evidence sufficiently show that the rental unit was in need of some cleaning and repairs at the end of the tenancy. While the tenant disputes some of the specific items claimed by the landlord, submitting that the landlord could have

found more economical alternatives, or that the damages were present earlier in the tenancy, I find that there is insufficient evidence in support of the tenant's submissions. I accept the landlord's evidence regarding the cost of cleaning and repairs to the rental unit. Accordingly, I issue a monetary award in the landlord's favour in the amount of \$600.35.

The landlord claims the amount of \$641.00 for what they characterize as liquidated damages. I find that of the list of items included under this head of claim there are only a few that might be related to the cost of re-leasing the rental suite. I find that the filing fee for the present application, the time charged by the property manager to attend the dispute resolution hearing and move-out inspection are not costs related to establishing a new tenancy. As outlined in Residential Tenancy Policy Guideline 4, a liquidated damage clause is an agreement in advance for the payment of a genuine pre-estimate of losses in the event of a breach of the tenancy agreement. It is not an opportunity for the landlord to claim any conceivable costs. I find the landlord's inclusion of items such as the attendance of the property manager at the move-out inspection or the dispute resolution hearing to not be covered under a genuine liquidated damage clause. I further note that the landlord is attempting to claim the filing fee for this application under this damage clause. I find that this clause of the tenancy agreement is not a true liquidated damage clause as the landlord attempts to utilize it to recover costs having little to do with the breach of the tenancy agreement. As a result, I find that this clause is unenforceable and I dismiss this portion of the landlord's claim accordingly.

As I find that the tenant's application was more successful I allow the tenant to recover the \$100.00 filing fee for their application from the landlords.

Conclusion

I issue a monetary award in the tenant's favour, in the amount of \$574.65 in the following terms:

Item	Amount
Double Security Deposit (2 x \$725.00)	\$1,450.00
Return of Key Deposit	\$200.00
Less Unpaid Rent for November, 2017	-\$575.00
Less Damages for Cleaning and Repairs	-\$600.35
Filing Fees	\$100.00
TOTAL	\$574.65

The tenant is provided with a Monetary Order in the above terms and the landlords must be served with this Order as soon as possible. Should the landlords 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 11, 2018

Residential Tenancy Branch