Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding RIVERWALK VILLAS INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCT, FFT
MNDL-S, FFL

Introduction

This hearing convened as a result of cross applications. In the Tenant's Application filed on November 20, 2017 they sought monetary compensation from the Landlord as well as recovery of the filing fee. In the Landlord's Application filed on February 2, 2018, the Landlord also sought monetary compensation from the Tenants, as well as authority to retain the balance of the Tenant's security deposit and to recover the filing fee.

The hearing was conducted by teleconference on July 4, 2018. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to 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

Issues to be Decided

1. Are the Tenants entitled to monetary compensation from the Landlord?

2. Is the Landlord entitled to monetary compensation from the Tenants?

3. What should happen with the Tenants' security deposit?

4. Should either party recover the filing fee?

Background and Evidence

Prior to initiating these proceedings, the Landlord hired a collection agency to pursue funds from the Tenants. Documentary evidence provided by the Tenants confirms that they paid $1,360.00 to the collection agency; the Tenants confirmed they did not agree to this amount but paid as they were concerned about a negative credit rating.

The Landlord's representative, S.S., testified that the company which initiated collection proceedings is the parent company of the named Landlord on the tenancy agreement.

S.S. stated that the $1,360.00 which was collected from the Tenants included compensation for liquidated damages, loss of rent, carpet cleaning and other cleaning and was calculated after retaining the Tenants' security deposit. S.S. confirmed that the Landlord did not file for Dispute Resolution or otherwise obtain an Order for payment of the amounts owing prior to initiating collection proceedings.

S.S. stated that the tenancy ended on September 25, 2017.

S.S. further stated that they did not receive a forwarding address from the Tenants and only received the Tenants' forwarding address when they received the Tenants' Application for Dispute Resolution. She confirmed that she called the Residential Tenancy Branch and was told that this was sufficient and that the Tenants could be served at this address.

The residential tenancy agreement was provided in evidence and which confirmed that this one year fixed term tenancy began August 1, 2017 and was to end on July 31, 2018. Rent was payable in the amount of $850.00 per month. The Tenants also paid a security deposit of $425.00 and a pet damage deposit in the amount of $425.00.

Paragraph 5 of the agreement provided that the Tenants were to pay liquidated damages as follows:

5. LIQUIDATED DAMAGES: If the tenant ends the fixed term tenancy before the end of the original terms as set out in (B) above, the landlord may treat this Agreement as being at an end. In such event the sum equal to $850.00 will be paid by the tenant to the tenant to the landlord as liquidated damages, and not as penalty. Liquidated damages cover the landlord's cost to re-rent the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damages to the rental unit or residential property.

S.S. confirmed that the rental unit was re-rented on October 11, 2017 for $845.00 per month. The new Tenants paid the sum of $546.00 in prorated rent, in addition to parking; as such, the amount the Landlord claimed a loss of rent in the amount of $304.00.

Paragraph 23 of the agreement provided that the Tenants were to pay the cost to clean the carpets at the end of the tenancy. The Landlord sought the sum of $150.00 for carpet cleaning.

The Landlord also charged the Tenants the sum of $350.00 for "general cleaning". In support of this amount, S.S. testified that when tenants give a move out notice, the Landlord provides the

Tenants a “Move Out Cleaning Checklist” which includes all the costs that would be charged if not complete. A copy of this checklist was provided in evidence and which coincided with the $350.00 charged.

The Landlord did not provide any photos of the rental unit to confirm the condition of the rental unit at the end of the tenancy. Further, the parties did not complete a move out condition inspection report.

S.S. confirmed that the Tenants paid the full amount of rent for September 2017 and did not pay rent for October 2017. S.S. further stated that the Tenants should be credited $546.00 for the fact that they received payment from the new Tenants for part of October. S.S. confirmed that this credit was not applied when the debt was sent to collections and as the Tenants paid the full amount owing to the collection company they overpaid. S.S. stated that the Tenants were reimbursed the sum of $576.00 by cheque which was cashed.

In response to the Landlord’s submissions, the Tenant V.A. testified as follows.

She confirmed the forwarding address is as noted on the Application for Dispute Resolution. She further confirmed that they did not provide their forwarding address to the Landlord in writing as she did not understand this was required.

V.A. stated that when they first discussed renting the rental unit they had communication with the building manager and informed her that they were trying to buy a home. She confirmed that nothing was in writing but the building manager was aware that they would move as soon as they found a home, and that they would only be charged a months’ rent, if the rental unit could not be re-rented. She stated that when they found a home and had a possession date they moved. She also stated that she returned the keys to S.S. at that time and S.S. did not express any concerns with them moving out before the end of the fixed term.

V.A. further stated that they did not participate in a move out condition inspection as they “were not informed they were required to do so”. She confirmed that the building manager did not speak to her about a move out inspection nor did she think to ask about one as it has been many years since they have rented, describing themselves as “older and naïve”. She further stated that she told the building manager to call them on her husbands’ cell phone or if they received any mail. She confirmed that at no time did S.S. ask for a forwarding address.

V.A. stated that the tenancy was not even two months such that the unit was clean and not damaged when the tenancy ended. She admitted that while she cleaned the rental unit when they moved out, she may not have cleaned the rental unit as expected by the Landlord. She stated that she believes the six hours of cleaning claimed is excessive, as the rental unit was a one bedroom apartment which they used essentially for sleeping and storing personal items as the majority of their items were all in storage.

Further, as they were actively looking for a home, they had their items in the bedroom and a foamy in the living room.

An incident report provided in evidence by the Landlord and completed by S.S., confirmed the Tenants spoke to her about moving out but did not provide a forwarding address.

V.A. stated that she does not understand what liquidated damages were and how the Landlord was able to claim these amounts.

V.A. further stated that they were desperate when they first signed the lease. They had previously made arrangements from another community as they had sold their home and had no options when they took the apartment. She stated that they ended up paying $600.00 at a hotel because they were supposed to see the rental unit on Friday but it was closed due to a staff function and they could not get in until the following Monday.

V.A. further stated that she felt the Landlord had misrepresented the agreement to them and took advantage of their desperate situation. She stated that she told the Landlord that they were not planning to stay a year as they were trying to buy a house and would be moving as soon as they found one. She stated that the Landlord told them not to worry and that they would only be charged a month's rent if they moved out before the term was up. She said that everything was very rushed and they were informed by the Landlord's staff that the worst they would have to pay is $860.00, which was cheaper than paying for a hotel. V.A. noted that the Landlord confirmed this conversation in their letter submitted in support of their application which reads as follows:

> They were shown a one-bedroom unit (336) which they liked. It was reviewed with them before the lease was signed that it was a one-year lease. However, it was determined that the cost of break the lease (Liquidated Damages $860.00) was cheaper to pay than to keep paying $200.00 a night for a hotel while they looked for a unit that would allow pets and be month to month.

The Tenant stated that the Landlord's claims that they had no means to contact them was absolutely incorrect as the collection agency sent a text message to her husband's cell phone. She stated that they paid, but only because they had a really clean credit rating and did not want it negatively affected.

In reply to the Tenants submissions the Landlord's representative confirmed that the Landlord did not take photos of the rental unit at the time the tenancy ended.

S.S. testified that the carpets were cleaned on October 10, 2017, the day before the new tenancy began.

S.S. confirmed that she was the one who spoke to the Tenant when they had moved out. She further confirmed that she did not offer them an opportunity to do a move out condition inspection nor did she ask for their forwarding address.

Analysis

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

Section 84.1 of the *Residential Tenancy Act* provides that the Residential Tenancy Branch has exclusive jurisdiction over tenancy matters. In the case before me, the Landlord initiated collection proceedings against the Tenants prior to filing for Arbitration and obtaining a Monetary Order. While the Tenants have paid the amount requested by the collection agency, I find this does not indicate their agreement with the amounts claimed; rather, I accept their testimony that they paid simply to avoid a negative effect on their credit. Failing an agreement between the parties, the Landlord's entitlement to monetary compensation from the Tenants is a matter to be determined by Arbitration before the Residential Tenancy Branch.
In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove all of the following four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;

- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and

- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

In the case before me the Landlord seeks monetary compensation for the following:

Liquidated damages	$860.00
Loss of rent	$304.00
Carpet cleaning	$150.00
General cleaning	$350.00
TOTAL	$1,664.00
Less Tenant's security and pet damage deposit	*$850.00*
Less amount paid to Tenants	*$576.00*
Total monetary order requested by Landlord	$238.00

The parties agreed the Landlord would be entitled to liquidated damages pursuant to paragraph 5 of the residential tenancy agreement. While the Tenants may not have understood the legal meaning of liquidated damages, it is clear from the Tenants' submissions as well as the letter from the Landlord provided in evidence that the parties discussed the liquidated damages clause at the time of signing the tenancy agreement.

Residential Tenancy Policy Guideline 4—Liquidated Damages provides in part as follows:

> 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.
>
> There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:
>
> - 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.
>
> 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. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

> If a liquidated damages clause if struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

In the case before me, there is no dispute that the Tenants breached the fixed term tenancy by ending their tenancy early.

In a recent decision of the B.C. Supreme Court, *Super Save Disposal Inc. v. Daily Sun Investment Co. Ltd.* [2011] BCSC 1784, the Court held as follows:

> [31] 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.
>
> [32] 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.
>
> [33] 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.

In this case, I find the liquidated damages clause to be enforceable. $860.00 represents just over one month's rent, which I find to be not extravagant in comparison to the greatest loss that could follow a breach. In this case, the tenancy was scheduled to end on July 31, 2018; as the Tenant vacated the rental unit 10 months prior and were potentially liable for the balance of rent for that term. I find the $860.00 sum to be a reasonable estimate of the amount the Landlord would lose in the event of the breach and I therefore find the Landlord is entitled to the **$860.00** claimed.

A tenancy must be ended in accordance with the *Act.* A tenant may end a tenancy provided that the notice complies with sections 45 and 52 of the *Act,* which provide as follows:

> **Tenant's notice**
>
> **45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
>
> (a) is not earlier than one month after the date the landlord receives the notice, and

(b) 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.

(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

(a) is not earlier than one month after the date the landlord receives the notice,

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and

(c) 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.

(3) 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.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

Form and content of notice to end tenancy

52 In order to be effective, a notice to end a tenancy must be in writing and must

(a) be signed and dated by the landlord or tenant giving the notice,

(b) give the address of the rental unit,

(c) state the effective date of the notice,

(d) except for a notice under section 45 (1) or (2) *[tenant's notice]*, state the grounds for ending the tenancy, and

(e) when given by a landlord, be in the approved form.

The parties agreed the Tenants did not give written notice to end their tenancy. Fortunately the Landlord was able to re-rent the rental unit quickly such that they only suffered a loss of $304.00 in rent. As the Tenants were potentially liable for the balance of the rental term pursuant to the fixed term tenancy, and failed to give proper notice to end their tenancy, I find the Landlord is entitled to the **$304.00** claimed.

This tenancy was for a period of two months. I accept the Tenants' testimony that they were actively looking for a new home and as such did not fully unpack or "live" in the rental unit as one would normally expect. I also accept their evidence that they did not damage the rental unit or leave it unclean.

While the tenancy agreement provides that the Tenants were responsible for the cost of carpet cleaning, the agreement also contemplated that the tenancy would be for a year. *Residential Tenancy Branch Policy Guideline 1—Landlord & Tenant: Responsibility for Residential Premises* provides that tenants are not generally responsible for carpet cleaning in tenancies of less than a year. In this case, the Landlord failed to provide photos of the rental unit to confirm carpet cleaning was required. While it may be the Landlord's practice to professionally clean the carpets irrespective of the length of tenancy, I am not satisfied that the Tenants are responsible for this cost and therefore deny the Landlord's claim for carpet cleaning.

Similarly, I am not satisfied the Landlord has proven their claim for $350.00 in general cleaning. This was a short term tenancy. Had the rental unit required cleaning at the end of the tenancy, it was incumbent on the Landlord to provide evidence such as photos. Without such corroborating evidence I am unable to accept the Landlord's claim that cleaning was required over the Tenants' claim that they cleaned. I therefore dismiss the Landlord's claim for $350.00.

The Tenants seek compensation from the Landlord equivalent to the amount paid to the collection agency, $1,360.00 as well as recovery of the filing fee. I find they are entitled to recovery of any amounts paid over and above the Landlord's entitlement.

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

Conclusion

The Landlord is entitled to monetary compensation in the amount of $1,164.00 calculated as follows:

Liquidated damages	$860.00
Loss of rent	$304.00
TOTAL	$1,164.00

While the collection agency may have taken a percentage of the amount collected from the Tenants, I find this is an expense to be borne solely by the Landlords as the Landlord failed to obtain a monetary order from the Branch before initiating these collection proceedings. I therefore find any amount paid to the collection agency by the Tenants to be to the Tenants' credit.

The Tenants have paid the sum of $1,360.00 to the Landlord and were refunded the sum of $576.00 such that they have directly paid $784.00 to the Landlord. The Landlord also retained their security and pet damage deposit in the amount of $850.00 such that the Landlord has the sum of $1,634.00 from the Tenants. As the Landlord is entitled to the sum of $1,164.00 I find the Tenants are entitled to be reimbursed the balance of $470.00.

The Tenants are granted a Monetary Order in the amount of **$470.00**. This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division) 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: July 13, 2018

Residential Tenancy Branch