



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 MNDC MNR FF

Introduction

This hearing dealt with the Landlord's Application for Dispute Resolution, made on March 16, 2018 (the "Application"). The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "*Act*"):

- a monetary order for money owed or compensation for damage or loss;
- a monetary order for unpaid rent or utilities; and
- an order granting recovery of the filing fee.

The Landlord was represented at the hearing by C.A. and K.H., agents. The Tenant attended the hearing on her own behalf. Both C.A., K.H., and the Tenant provided affirmed testimony.

On behalf of the Landlord, C.A. testified the Application package was served on the Tenant in person. The Tenant acknowledged receipt. Further, the Tenant testified the documentary evidence she relies upon was served on the Landlord by registered mail. C.A. acknowledged receipt. Neither party raised any issues with respect to service or receipt of the above documents. Pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were given the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

1. Is the Landlord entitled to a monetary order for money owed or compensation for damage or loss?
2. Is the Landlord entitled to a monetary order for unpaid rent or utilities?
3. Is the Landlord entitled to an order granting recovery of the filing fee?

Background and Evidence

A copy of the tenancy agreement between the parties was submitted into evidence. It confirms the fixed-term tenancy began on February 1, 2018, and was expected to continue until January 31, 2019. Rent in the amount of \$1,695.00 per month was due on the first calendar day of each month. The Tenant paid a security deposit of \$847.50, which the Landlord holds.

The Landlord's claim was summarized on a Monetary Order Worksheet, dated July 26, 2018. First, the Landlord claims \$1,695.00 for unpaid rent that was due on March 1, 2018. During the hearing, the parties agreed the tenancy ended when the Tenant gave notice to the Landlord via email on February 28, 2018. The notice advised of the Tenant's intention to vacate the rental unit on March 1, 2018, which she did. C.A. testified the Landlord was able to re-rent the unit, effective April 1, 2018.

The Tenant testifies she was justified in ending the tenancy because of a loud "roaring engine" noise in the rental unit. In a letter dated February 23, 2018, the Tenant complained of "a thousand frogs singing...the engine roaring...that cacophony". The letter requested a resolution by February 23, 2018.

The Tenant submitted a portion of a subsequent letter dated February 26, 2018, which appears to repeat the concerns expressed in the February 23, 2018, letter.

In specific response to the Tenant's evidence about noise, C.A. testifies that both she and building managers inspected the Tenant's rental unit at all times of the day and night on February 11, 12, 23, 26, 27, and 28, 2018. However, the investigations revealed, at most, a "faint humming" noise.

Second, the Landlord claims \$180.00 for four hours of general cleaning. This amount is based on a list of standard charges submitted into evidence by the Landlord.

In reply, the Tenant testifies the rental unit was cleaned when she vacated.

Third, the Landlord claims \$50.00 for late rent and NSF fees for rent that was due on March 1, 2018. The Landlord relies on paragraph 11 of the tenancy agreement, which appears as follows:

11.	ARREARS. Late payment, returned or non-sufficient funds (N.S.F.) cheques are subject to an administrative fee of not more than \$25.00 each, plus the amount of any service fees charged by a financial institution to the landlord. Although these fees are payable by the tenant to the landlord, failure to pay the rent on the due date is a breach of a material term of this Agreement. The obligation of the tenant under this Agreement and by law requires the rent to be paid on the date that it is due. For example, an excuse that the tenant does not have the rent money or will not have the rent money until a later date is not an acceptable excuse in law.

As noted above, the Tenant acknowledged rent was not paid when due on March 1, 2018.

Fourth, the Landlord claims \$805.33 as liquidated damages. The Landlord relies on paragraph 5 of the tenancy agreement, which appears as follows:

5.	LIQUIDATED DAMAGES. If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the landlord to end the tenancy before the end of the term as set out in B above, or any subsequent fixed term, the tenant will pay to the landlord the sum of \$ <u>805.33</u> as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.

As noted above, the Tenant acknowledged rent was not paid when due on March 1, 2018. However, she disagreed with this aspect of the Landlord's claim as the Landlord has already kept the security deposit pending the outcome of this hearing.

Fifth, the Landlord claims \$100.00 in recovery of the filing fee paid to make the Application.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

Section 67 of the *Act* empowers me to order one party to pay compensation to the other if damage or loss results from a party not complying with the *Act*, regulations or a tenancy agreement.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided for in sections 7 and 67 of the *Act*. An applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and
4. That the party making the application did what was reasonable to minimize the damage or loss.

In this case, the burden of proof is on the Landlord to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Landlord. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did what was reasonable to minimize the damage or losses that were incurred.

With respect to the Landlord's claim for \$1,695.00 for unpaid rent, section 45(2) of the *Act* confirms a tenant may not end a tenancy earlier than the date specified in the tenancy agreement as the end of the tenancy. Further, section 26(1) of the *Act* confirms that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this *Act*, the regulations or the tenancy agreement, unless the tenant has a right under this *Act* to deduct all or a portion of the rent.

In this case, I find the Tenant was not entitled to end the fixed-term tenancy under section 45(2) of the *Act*. I find that while the Tenant complained of noise, the Landlord responded in a reasonable and timely manner, but was unable to hear more than a faint humming in the rental unit. In any event, I find the Tenant did not wait a reasonable amount of time to permit the Landlord to investigate and deal with any noise of concern to the Tenant. Further, I find the Tenant continued to occupy the rental unit on March 1, 2018, on which date rent was due. Accordingly, I find the Landlord demonstrated an entitlement to a monetary award for unpaid rent in the amount of \$1,695.00.

With respect to the Landlord's claim for \$180.00 for four hours of cleaning, I find there is insufficient evidence before me to conclude the Landlord is entitled to this aspect of the claim. The evidence from C.A. and the Tenant is contradictory and there is no additional evidence from the Landlord (such as photographs or a condition inspection report) to satisfy me this aspect of the Landlord's claim should succeed on a balance of probabilities. This aspect of the Landlord's claim is dismissed.

With respect to the Landlord's claim for \$50.00 for late rent or NSF fees, section 7 of the Regulations permits a landlord to charge non-refundable fees, including "an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent", as long as the tenancy agreement provides for that fee.

In this case, paragraph 11 of the tenancy agreement provides for administration fees. As rent was not paid when due on March 1, 2018, I find the Landlord is entitled to a \$25.00 NSF fee and a \$25.00 late payment fee. Therefore, I find the Landlord has demonstrated an entitlement to a monetary order in the amount of \$50.00 for administrative fees.

With respect to the Landlord's claim for \$805.33 as liquidated damages, Policy Guideline #4 states:

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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause is 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.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

[Reproduced as written.]

In this case, I find the liquidated damages amount was a genuine pre-estimate of the Landlord's cost to re-rent the unit and was not an unenforceable penalty. Further, I note the liquidated damages amount was less than ½ of the monthly rent due. Accordingly, I find it was not oppressive. I find the Landlord has demonstrated an entitlement to liquidated damages in the amount of \$805.33.

Having been successful, I find the Landlord is entitled to recover the \$100.00 filing fee paid to make the Application. In addition, I order that the Landlord may retain the security deposit held in partial satisfaction of the claim.

Pursuant to section 67 of the *Act*, I grant the Landlord a monetary order in the amount of \$1,802.83, which has been calculated as follows:

Claim	Amount allowed
Unpaid rent (March 2018)	\$1,695.00
Administration fees:	\$50.00
Liquidated damages:	\$805.33
Filing fee:	\$100.00
<i>LESS</i> security deposit:	(\$847.50)
TOTAL:	\$1,802.83

Conclusion

The Landlord is granted a monetary order in the amount of \$1,802.83. The monetary order may be filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

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: October 12, 2018

Residential Tenancy Branch