



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Remax Management Solutions
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNDC MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on January 15, 2019. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "Act").

The Landlord attended the hearing. The Tenants did not attend the hearing. The Landlord stated that he sent the Tenants each a copy of the Notice of Hearing and evidence by registered mail to the forwarding address provided to him on the move out inspection report. The Landlord sent two packages, with the first package including the Notice of Hearing, on September 20, 2018. The Landlord stated that these packages were signed for, so he knows they were aware of this hearing, and just chose to ignore it. Pursuant to section 88 and 90 of the Act, I find the Tenants are deemed to have received these documents on September 25, 2018, the fifth day after their mailing.

The second package from the Landlord was sent to each of the Tenants at the forwarding address they provided on January 2, 2019. The Landlord stated that all of these packages were refused and sent back to him. Although the rules of procedure typically require the applicant to serve their evidence at least 14 days prior to the hearing, I am mindful that these packages were refused by the Tenants, and the Tenants failed to attend to refute the claims in the Landlord's application. Pursuant to section 88 and 90 of the Act, I find the Tenants are deemed to have received the second packages on January 7, 2019, the fifth day after their mailing. I find the Landlord has sufficiently served the Tenants with his application and evidence.

The Landlord was provided 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

- Is the Landlord entitled to a monetary order for rent or for damage or loss under the Act?
- Is the Landlord entitled to retain all or a portion of the Tenants' security deposit in partial satisfaction of the monetary order requested?
- Is the Landlord entitled to recover the cost of the filing fee?

Background and Evidence

The Landlord stated that the Tenants signed a fixed term tenancy agreement starting on April 1, 2018 and ending March 31, 2019. The Landlord stated that the Tenants gave notice mid-August and vacated on August 31, 2018. The Landlord provided a copy of the tenancy agreement which specifies:

- monthly rent is \$1,700.00
- the Landlord holds a security deposit of \$850.00 and a pet deposit of \$850.00.

The Landlord provided a monetary order worksheet which speaks to 3 items as follows:

- 1) Liquidated Damages - The Landlord pointed to clause #5 of the tenancy agreement which specified that the Tenants are liable to pay \$625.00 as liquidated damages if they break the lease early. The Landlord stated that this is the amount it cost to re-rent the unit, as it is professionally managed.
- 2) Lost Rent – The unit sat empty for September, October, November and half of December, so the Landlord is looking for the rent that the Tenants should have been paying, had they lived there. This totals \$5,950.00.

The Landlord stated that as soon as they got Notice from the Tenants that they would be leaving early (mid-August), they reposted the rental ad. The Landlord stated that he is a realtor and a professional property manager, and Kelowna is currently dealing with an oversupply of rentals, due to the overbuilding. The Landlord stated that in his 12 years as a realtor, he has not seen this many empty rental units. The Landlord stated that he only had a few people interested over the few months, and most of them were very low quality renters, so it didn't pan out. The Landlord stated that eventually, in mid-October 2018, they reduced the price by \$150.00, and they signed on the new Tenants on December 7, 2018 (they moved in on December 15, 2018.)

- 3) Filing fee of \$100.00

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

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

Item #1 - \$625.00 – Liquidated Damages - Residential Tenancy Policy Guideline 4 provides for liquidated damages. 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 fixed term by the Tenant. If a liquidated damages clause is determined to be valid, the Tenant must pay the stipulated sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. Therefore, I grant the Landlord's request to recover liquidated damages of \$625.00 from the Tenants.

Item #2 - \$5,950.00 in lost rent as summarized above - I note the following relevant portions of the *Policy Guideline #5 – Duty to Minimize Loss*:

Claims for loss of rental income

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent.

The Landlord is seeking to recover lost rent for the period from September 1, 2018 until December 15, 2018, the period of time that the unit was vacant. I accept that the rental market may have softened over the last few months in the material area, and this may have impacted the ability of the Landlord to re-rent the unit. I also note that the Tenants were under a fixed term tenancy agreement until March of 2019, and were not in a position to legally end the tenancy without repercussion. I find the Tenants breached the Act and the tenancy agreement when they gave Notice and left early. As such, I find the Landlord is entitled to compensation. However, I find the Landlord did not take sufficient steps to mitigate the loss. I find the Landlord waited too long to reduce the rent in order to attract a new renter, and in doing so, he contributed to difficulties in re-renting. I note the Landlord eventually lowered rent by \$150.00 later in October. However, this is around 2 months after posting the ad with limited or no success. Since the Landlord failed to effectively mitigate his lost rent, I decline to award him the full amount of his claim. I find a more reasonable amount is 50% of the rent over the material time. I award the Landlord \$2,975.00 for this item.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was substantially successful with his application, I order the Tenants to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security and pet deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	Amount
Liquidated Damages	\$625.00
Lost Rent	\$2,975.00
PLUS: Filing Fee	\$100.00
Subtotal:	\$3,700.00
LESS: Security and Pet Deposit	\$1,700.00
Total Amount	\$2,000.00

Conclusion

The Landlord is granted a monetary order in the amount of **\$2,000.00**, as specified above. This order must be served on the Tenants. If the Tenants fail to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: January 17, 2019

Residential Tenancy Branch