



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      FFL, MNDCL-S, MNDL-S

### Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for its application from the tenant, 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, to call witnesses and to cross-examine one another. The parties acknowledged receipt of evidence submitted by the other. I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

### Issues to Decide

Is the landlord entitled to a monetary award for damage and loss arising out of this tenancy?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to the recovery of the filing fee?

### Background and Evidence

The landlord gave the following testimony. The one year fixed term tenancy began on February 1, 2018 and was scheduled to end on January 31, 2019. On August 28, 2018 the tenant sent an email to the landlord advising that they would be moving out on

September 30, 2018. The landlord testified that the monthly rent was \$2300.00 and that the tenants provided a security deposit of \$1150.00 at the outset of the tenancy which the landlord still holds. The landlord testified that she did not agree with the tenants "breaking the lease" and reminded them of the liquidated damages clause in their tenancy agreement.

The landlord testified that the tenants left the unit dirty at move out. The landlord testified that the dishwasher door was "clunking" and that the enerpro tablet wasn't working. The landlord testified that the tenant had friends misrepresent themselves and their identities in an attempt to distort the move out inspection process. The landlord testified that she seeks the liquidated damages as per their tenancy agreement, and that she should be entitled to retain the deposit as a result of the tenant leaving the unit dirty and damaged and for abandoning the inspection prior to its completion along with the recovery of the filing fee for a total claim of \$3550.00.

The tenants gave the following testimony. MJ testified that she was very intimidated by the landlord and asked her friends to attend to help her cope. MJ testified that she had hired cleaners and that she wasn't really sure about the damage as claimed. MJ testified that they had a great opportunity to relocate to Kelowna and that they were very flexible and helpful in helping the landlord rent the unit. MJ testified that she feels the liquidated damages is a penalty since the landlord was able to re-rent the unit and didn't suffer any loss. CW testified that they had no intention of ending the tenancy early but the opportunity that arose was too good to pass up.

### Analysis

The relationship between the parties is an acrimonious one. The hostility towards the parties was evident throughout the hearing. While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

#### Security Deposit - \$1150.00

The landlord testified that the tenant had three other individuals attend the move out inspection to disrupt, distract and disrespect the entire process. The tenant testified that the landlord was intimidating and that her friends were there for support purposes only. Section 35 and 36 of the Act address the issue before me as follows:

**Condition inspection: end of tenancy**

- 35** (1) The landlord and tenant together must inspect the condition of the rental unit before a new tenant begins to occupy the rental unit
- (a) on or after the day the tenant ceases to occupy the rental unit, or
  - (b) on another mutually agreed day.
- (2) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (3) The landlord must complete a condition inspection report in accordance with the regulations.
- (4) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
- (5) The landlord may make the inspection and complete and sign the report without the tenant if
- (a) the landlord has complied with subsection (2) and the tenant does not participate on either occasion, or
  - (b) the tenant has abandoned the rental unit.

**Consequences for tenant and landlord if report requirements not met**

- 36** (1) The right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if
- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*], and
  - (b) the tenant has not participated on either occasion.

The tenant left before doing a complete inspection and without signing the move out condition inspection report. The tenant could have checked off the box that she didn't agree with the report and address the issue through the Branch, but chose to just leave. In the tenants own testimony she stated "I felt I couldn't go on and left". I find that the tenant did abandon the condition inspection walk through before it was completed and therefore has not met her obligations under the Act and has extinguished her right to make a claim for the deposit, accordingly; I find that the landlord is entitled to retain the security deposit of \$1150.00.

Liquidated Damages – \$2300.00

When a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord may incur costs of re-renting earlier than it would have without the breach. This may expose the landlord to extra costs of re-rental. However, when the sum of the liquidated damages is a high amount, it can be viewed as a penalty rather than the actual cost of re-rental. While the landlord testified that she had spent six hours cleaning, she has not satisfied me that these costs equal a full month's rent of \$2300.00. In addition, the landlord testified that there was some damaged items in the unit yet did not repair them and was still able to find a tenant to move in on October 1, 2018.

The landlord has not met its burden to show that the liquidated damages are intended to cover the cost of re-rental. The landlord also failed to provide any evidence to demonstrate how an amount equal to one month's rent was selected as a reasonable pre-estimate for the cost of re-rental at the time of the signing of the tenancy agreement. Therefore, I find that the landlord is attempting to impose a penalty upon the tenant by charging liquidated damages of \$2300.00 for breach of the fixed term agreement. I find that the liquidated damages clause in the tenancy agreement is unenforceable. Accordingly, the landlord's claim for liquidated damages in the amount of \$2300.00 is dismissed without leave to reapply.

As the landlord has been partially successful in their application, I find that they are entitled to the recovery of the \$100.00 filing fee.

### Conclusion

The landlord is granted a monetary order of \$100.00.

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: February 05, 2019

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Residential Tenancy Branch