



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S MNDL-S FFL**

Introduction

This hearing dealt with an application by the landlords under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* (“*Regulation*”) or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant’s security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*; and
- Authorization to recover the filing fee for this application pursuant to section 72.

The landlords attended with their agent DS (“the landlords”). The tenant attended. Both parties provided affirmed testimony. Each party had the opportunity to make submissions, present documentary evidence, call witnesses and cross examine the other party.

The tenant acknowledged receipt of the Notice of Hearing and Application for Dispute Resolution. No issues of service with respect thereto were raised. I find the landlords served the tenant with these documents in accordance with section 89 of the *Act*.

Preliminary Issue

The landlords filed an Amendment to their Application for Dispute Resolution on January 30, 2019 to increase the amount of the landlords' monetary claim to \$10,337.89. The landlords provided testimony they served the tenant with the Amendment and supporting documents by registered mail sent on January 30, 2019. The landlords provided the Canada Post tracking number in support of service referenced on the first page of this decision.

The tenant stated he did not receive the documents. The tenant testified the documents were sent to his previous address at which the landlords had served him with the Notice of Hearing and Application for Dispute Resolution. The tenant testified he had since moved, had not informed the landlords and had not provided his new address to them. The tenant objected to the Arbitrator considering the Amendment and supporting documents as they were not sent to his present (correct) address.

Section 4.6 of the *Rules of Procedure* state that the applicant must demonstrate to the satisfaction of the arbitrator that the applicant served the respondent with the Amendment to an Application for Dispute Resolution and supporting evidence as required by the *Act* and the Rules of Procedure. Service must take place in a manner required by section 89 of the *Act*.

Section 89 of the *Act* states as follows [in part, emphasis added]:

- 89 (1) An application for dispute resolution ... when required to be given to one party by another, must be given in one of the following ways:
- (a)...
 - (b)...
 - (c) by sending a copy by registered mail to the address ***at which the person resides ...***

Section 71 of the *Act* provides that an Arbitrator may find that a document has been "sufficiently served" although the document is not served in accordance with section 89. The relevant parts of section 71 state as follows:

- 71 (1) ...
- (2) ... the director may make any of the following orders:
- (a) that a document must be served in a manner the director considers necessary, despite sections 88 [*how to give or serve documents generally*] and 89 [*special rules for certain documents*];

(b) that a document has been sufficiently served for the purposes of this Act on a date the director specifies;

(c) that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

The tenant acknowledged the landlords sent the Amendment and documents to the only address he had provided to the landlords. The tenant acknowledged he changed his address and did not notify the landlords. The tenant acknowledged receipt of the landlords' initial claim and supporting documents.

Considering the testimony of the parties, and the above sections of the *Act*, I find the tenant was sufficiently served with the Amendment and supporting documents pursuant to section 71. Further to section 90, I find the landlords served the tenant five days after the registered mail was sent, that is, on February 4, 2019.

Issue(s) to be Decided

Are the landlords entitled to the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*; and
- Authorization to recover the filing fee for this application pursuant to section 72.

Background and Evidence

The parties agreed they entered into a one-year fixed term tenancy starting July 1, 2018 for monthly rent of \$2,100.00 payable on the first of the month. At the beginning of the tenancy, the tenant provided a security deposit and a pet deposit each in the amount of \$1,050.00 for a total of \$2,100.00 ("the deposits"). The landlord submitted a copy of the agreement. The landlord held the deposits. The tenant did not provide authorization to the landlord to retain the deposits.

The agreement contained a clause relating to liquidated damages. Clause #5 stated that if the tenant breaches a material term of the agreement or if the tenant ended the

tenancy early, the tenant will pay the landlord the sum of \$1,134.00 as liquidated damages.

The tenant failed to pay rent when due in September 2018. Accordingly, the landlord issued a 10 Day Notice to End Tenancy for Unpaid Rent and served the tenant on September 2, 2018. The landlord obtained an order of possession for the unit on September 21, 2018 and filed the order in the Supreme Court of British Columbia on September 27, 2018, obtaining a writ of possession on that date; the landlord provided a receipt for the \$120.00 filing fee.

On October 2, 2018, the landlord served the Writ of Possession on the tenant which required that the tenant vacate in two days. As the tenant did not vacate the unit, the landlord retained the services of a bailiff to remove the tenant's possessions; the landlord paid the bailiff fees. The landlord submitted a copy of a receipt from a bailiff service in the amount of \$2,200.00 for which the landlord requests reimbursement.

The parties conducted a condition inspection on moving in; the landlords submitted a copy of the condition inspection report on moving in as evidence. In all material respects, the report described the unit as being in good condition.

The landlord submitted a list of the opportunities provided to the tenant to attend a condition inspection on moving out. The parties agreed the landlord attempted to contact the tenant to attend a final inspection. The tenant acknowledged the landlord served a Final Notice to Attend Inspection. The tenant stated personal matters occupied him at the time and he was not able to attend. The landlord submitted as evidence a copy of the Condition Inspection Report on moving out dated October 6, 2018 and signed only by the landlord. The report lists many deficiencies to the unit's condition.

During the hearing, the tenant agreed to reimburse the landlords for the following expenses:

ITEM	AMOUNT
Carpet cleaning	\$100.00
Cleaning	\$360.00
Total Expenses Tenant Agreed to Reimburse	\$460.00

During the hearing, the landlord clarified the additional items for which the landlord claimed reimbursement:

ITEM	AMOUNT
Obtaining Writ of Possession – fee	\$120.00
Rubbish removal	\$105.00
Vacuum cleaner replacement	\$597.73
Bailiff fees	\$2,200.00
Property agent's fees	\$1,404.38
Liquidated damages	\$1,134.00
Rent for September 2018	\$2,100.00
Rent for October 2018	\$2,100.00
Rent for November 2018	\$2,100.00
Total Disputed Claim	\$11,861.11

The tenant submitted no documentary evidence.

I examine each of the landlords' claims in turn.

Writ of Possession

The landlords submitted a copy of the Writ of Possession and the receipt of the filing fee in the amount of \$120.00.

Rubbish removal

The landlords submitted an invoice in the amount of \$105.00 and testified this was the cost of removing garbage and debris left by the tenant which the municipality would not collect.

The tenant denied he was responsible for any such debris.

Vacuum cleaner replacement

The landlord testified the unit had a vacuum cleaner which could not be located when the tenant vacated. The tenant acknowledged he had some parts of the vacuum cleaner in storage.

The landlords did not replace the vacuum cleaner and testified they have subsequently rented the house without it. The landlords submitted an estimate of the cost of replacing the vacuum cleaner in the amount of \$597.73. The landlords testified the vacuum cleaner was eight years old and did not submit evidence of the purchase cost.

The tenant denied he is responsible for the cost of replacing the vacuum cleaner because he did not use it; in any event it was a dated model.

The condition inspection report on moving out stated the vacuum and attachments are missing.

Bailiff fees

The landlord submitted a copy of an invoice from the bailiff dated October 18, 2018 in the amount of \$2,200.00 for the removal of the tenant's belongings from the house pursuant to the Writ of Possession.

The tenant denied he should have to reimburse the landlords for the bailiff fees as this was a "cost of doing business" which the landlords should bear.

Property agent's fees

The landlord submitted a copy of an invoice from the agent DS who attended the hearing as the representative and agent of the landlord. The invoice lists tasks undertaken by the agent in managing the eviction of the tenant and re-renting of the property for a total amount claimed of \$1,404.38. The landlord claims reimbursement in this amount for the services of the agent which included delivering documents, contacting the bailiff, coordinating cleaning and attending the hearing.

The landlords testified that they currently vacationing outside the country and could not attend to these matters for which they retained the agent. The landlords sought reimbursement of this expense

The tenant denied he should have to reimburse the landlords for the agent's account as these activities were the "cost of doing business" which the landlord should bear.

Liquidated damages

The landlords claim liquidated damages in the amount of \$1,134.00. The landlords based the claim on a provision of the tenancy agreement which stated that, if the tenant vacated the unit prior to the end of the term, the tenant is required to pay the landlords liquidated damages in this amount.

The tenant acknowledged that the agreement contained a liquidated damages clause. However, the tenant stated that the landlords are "doubling up" on expenses and charged him twice for the same activities; the liquidated damages clause covers the expenses for which the landlords sought compensation under this heading.

In reply, the landlords responded that the amount of liquidated damages was a reasonable estimate of the costs of advertising and locating a suitable tenant for the unit if the tenant vacated before the end of the term. The landlords asserted that the agent's activities for which they sought reimbursement are activities over and above those covered by the clause.

Rent for September 2018 and October 2018

The tenant acknowledged that he did not pay rent for September 2018 or October 2018; he was resident in the unit both months until he the bailiff removed his possessions on October 2, 2018.

The tenant denied he is responsible for rent for these months; he stated the landlords should have rented the unit as soon as he was removed. The landlords stated the unit required cleaning and that they had attempted to find replacement tenants as early as September 2018, without success.

Rent for November 2018

The landlords detailed efforts to find a replacement tenant beginning in early September 2018. Efforts included multiple website listings, paying for premium advertising, communicating with interested applicants, showing the unit, and, finally, finding a new tenant in mid-November 2018 to begin renting December 1, 2018 at a reduced rent. The

landlords testified the market “took a downturn” at the time the tenant vacated. The landlords testified there was only one showing of the unit in October 2018 to a prospective tenant who had that day alone viewed over ten homes to rent.

The tenant testified that the landlordz should have been able to find a replacement tenant right away for the unit. The tenant denied any obligation to pay rent for October 2018, as stated above, and November 2018.

Analysis

The landlord submitted many photographs and substantial evidence. I will not refer to all the evidence in my Decision, but only to selected, relevant portions of the evidence.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

The purpose of compensation is to put the person who incurred the damage or loss in the same position as if the damage or loss had not occurred. The person claiming compensation must establish **all** of the following four points:

1. The existence of the damage or loss;
2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. Everything reasonable was done to reduce or minimize (mitigate) the amount of the loss or damage as required under section 7(2) of the *Act*.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

In this case, the onus is on the landlords to prove they are entitled a claim for a monetary award.

Reference to each of the landlords’ claims follows.

Writ of Possession

Based upon the uncontradicted testimony and evidence presented by the landlords and the burden of proof, I find on a balance of probabilities that the landlords have established a claim against the tenant for reimbursement for the filing fee for the Writ of Possession. I accordingly grant the landlords an award in this amount.

Rubbish Removal

Based upon the uncontradicted testimony and evidence presented by the landlords and the burden of proof, I find on a balance of probabilities that the landlords have established a claim against the tenant for reimbursement of the bailiff fees in the amount of \$2,200.00. I accordingly grant the landlords an award in this amount.

Vacuum cleaner

The landlords did not provide evidence of the cost or age of the vacuum cleaner which the landlord acknowledged was purchased several years ago. The landlords have not replaced this item and have rented the unit to a subsequent occupant without a new vacuum. The landlords have not incurred a demonstrable expense in support of which a receipt is filed.

Nevertheless, I accept the landlord has incurred a loss in this regard for which the tenant has acknowledged partial responsibility as he is in possession of some of the attachments for the vacuum. Based upon the testimony and evidence presented by the landlords and the burden of proof, I find on a balance of probabilities that the landlords have established a claim against the tenant for reimbursement in the amount of \$100.00. I accordingly grant the landlords an award in this amount.

Rent for September, October and November 2018

A tenant may only end a fixed term tenancy agreement in limited and specific circumstances as provided under section 45 (2) and (3) of the *Act*, which are situations where a tenant is fleeing domestic violence or going into a care home; or where the landlord has violated a material term of a tenancy agreement; as authorized by the Director. None of these circumstances apply to this case.

Section 7 of the *Act* provides that where a landlord claims against a tenant for loss of rent the landlord has a burden to prove the landlord took made every reasonable effort to minimize losses.

I find the tenant occupied the unit for the month of September 2018 and rent in the amount of \$2,100.00 is outstanding. I find the tenant was removed by the bailiff on October 2, 2018 and rent for the month of October 2018 is outstanding.

I accept the landlords' evidence as to the landlords' reasonable efforts to minimize loss of rent and find a new occupant beginning in early September 2018 shortly after serving the tenant with a notice to vacate. The landlord submitted evidence of advertisements and eventual reduction of the rent to find a new tenant. I accept that the landlord was unable to find a new tenant until December 1, 2018 despite reasonable efforts. Considering the evidence submitted, I find the landlords have met the burden of proof on a balance of probabilities with respect to this aspect of the landlords' claim. I accordingly award the landlord rent for these three months as claimed.

I accordingly grant the landlords a monetary order for rent for three months in the amount of \$2,100.00 a month.

Liquidated Damages

The tenancy agreement contained a clause which stated the tenant agreed to pay \$1,404.83 as liquidated damages payment if the tenant breached a material term of the tenancy agreement or if the tenant ended the tenancy by vacating before the end of the fixed term.

A liquidated damages clause is a clause in a tenancy agreement in which the parties agree in advance to the amount of 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 made. Otherwise, the clause may be held to constitute a penalty and, as a result, is unenforceable.

In this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting a unit after the tenant's breach.

The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed-term tenancy agreement is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed term tenancy agreement resulting in a premature end to the tenancy, the landlord incurs the costs of re-renting earlier than it would have without the breach. This exposes the landlord to extra costs of re-rental. For that reason, I find there is a loss to the landlord associated with the tenant's breach.

The next question is whether the amount specified by the landlord (being \$1,134.00) meets the test of being a genuine pre-estimate of that loss.

The landlord stated that the liquidated damages are to cover administrative costs of the rental advertisement in several local newspapers and websites, to answer phone calls about the unit, and to show the unit to potential tenants.

The tenant breached the fixed term tenancy agreement which contained a liquidated damages clause. Considering the uncontradicted evidence of the landlords, the evidence submitted, and the burden of proof required, I find on a balance of probabilities that the landlords have established a claim against the tenant for the liquidated damages as a genuine pre-estimate of the costs of re-rental of the unit. Accordingly, I find that the landlord is entitled to a monetary award against the tenants in the amount of \$1,134.00 for liquidated damages.

Property Manager's Fees

Section 67 of the *Act* provides the Arbitrator with authority to determine compensation under the *Act*. A landlord or tenant who does not comply with the *Act*, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss. The party who claims compensation must do whatever is reasonable to minimize the damage or loss.

I understand the landlords' frustration with the administrative expenses associated with this tenancy. However, I find it is not the tenant's responsibility in this case to reimburse the landlord for the claimed expenses associated with the landlords' decision to live elsewhere.

I therefore find the landlords are not entitled to the claimed expenses under this heading.

Filing Fees

As the landlords have been successful in this matter, I award reimbursement of the filing fee in the amount of \$100.00 pursuant to section 72.

Summary

I award the landlords **\$10,514.00** as follows:

ITEM	AMOUNT
Expenses tenant agreed to reimburse landlord	\$460.00
Writ of Possession	\$120.00
Rubbish removal	\$100.00
Vacuum cleaner replacement	\$100.00
Bailiff fees	\$2,200.00
Liquidated damages	\$1,134.00
Rent for September 2018	\$2,100.00
Rent for October 2018	\$2,100.00
Rent for November 2018	\$2,100.00
Filing fee	\$100.00
Total Monetary Award	\$10,514.00

Further to section 72, I authorize the landlord to retain the deposits of \$2,100.00 for a final monetary order to the landlords of **\$8,414.00**, calculated as follows:

ITEM	AMOUNT
Total Monetary Award	\$10,514.00
(Deposits)	(\$2,100.00)
Monetary Order Landlord	\$8,414.00

Conclusion

The landlords are entitled to a monetary order in the amount of **\$8,414.00**. This order must be served on the tenant. If the tenant fails to comply with this order, the landlord may file the order in the Provincial Court (Small Claims) to 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: March 2, 2019

Residential Tenancy Branch