



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CENTURY 21 QUEENSWOOD
LTD and [tenant name suppressed to protect privacy]

DECISION

<u>Dispute Codes</u>	Landlord:	MNDC MNR MNSD FF
	Tenant:	MNSD FF

Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the parties under the *Residential Tenancy Act* (the “*Act*”).

The Landlord’s Application was made on December 20, 2018 (the “Landlord’s Application”). The Landlord applied for the following relief pursuant to the *Act*:

- a monetary order for money owed or compensation for damage or loss;
- a monetary order for unpaid rent or utilities;
- an order permitting the Landlord to retain the security deposit and/or pet damage deposit in partial satisfaction of the claim; and
- an order granting recovery of the filing fee.

The Tenants’ Application was made on March 14, 2019 (the “Tenants’ Application”). The Tenants applied for the following relief pursuant to the *Act*:

- an order that the Landlord return all or part of the security deposit or pet damage deposit; and
- an order granting recovery of the filing fee.

The Landlord was represented at the hearing by K.M., an agent. The Tenants were represented at the hearing by S.C., an advocate. Both K.M. and S.C. provided affirmed testimony.

On behalf of the Landlord, K.M. testified the Landlord's Application package and evidence was served on the Tenants by registered mail. S.C. acknowledged receipt. Further, on behalf of the Tenants, S.C. testified the Tenants' Application package and documentary evidence was served on the Landlord by registered mail. K.M. acknowledged receipt.

No issues were raised during the hearing with respect to service or receipt of the above documents. The parties were represented at the hearing. Both K.M. and S.C. were prepared to proceed. Therefore, pursuant to section 71 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were provided the opportunity to present their 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 and to which I was referred. 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 permitting the Landlord to retain the security deposit and/or pet damage deposit in partial satisfaction of the claim?
4. Is the Landlord entitled to an order granting recovery of the filing fee?
5. Are the Tenants entitled to an order that the Landlord return all or part of the security deposit or pet damage deposit?
6. Are the Tenants 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 confirmed the fixed-term tenancy began on May 1, 2018, and was expected to continue to April 31, 2019. I accept this is a typographical error in the agreement and that the tenancy was to end on April 30, 2019. Rent in the amount of \$2,350.00 per month was due on the first day of each month. The Tenants paid a security deposit of \$1,175.00, which the Landlord holds.

The Landlord's Claim

The Landlord's claim was summarized in the Landlord's Application. First, the Landlord claimed \$587.50 as liquidated damages. On behalf of the Landlord, K.M. referred to the tenancy agreement submitted. Paragraph 5 of the tenancy agreement confirms the Landlord is entitled to liquidated damages in the amount of \$587.50. It states:

LIQUIDATED DAMAGES. *If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of [\$587.50] as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.*

[Reproduced as written.]

K.M. testified the Tenants ended the fixed-term tenancy by giving notice in writing before September 1, 2018. Further, K.M. and S.C. confirmed the tenancy ended on September 30, 2018, at which time the Tenants vacated the rental unit. K.M. testified that the Landlord sought to re-rent the unit and were able to find new tenants commencing November 1, 2018. The option was presented to the Tenants to accept the new tenancy that would begin on November 1, 2018, or that they could "roll the dice" to see if new tenants could be in place effective October 1, 2018. According to K.M., the Tenants agreed with the first option.

In reply, S.C. suggested the Landlord's failure to address issues with the rental property resulted in a breach of the tenancy agreement. Specifically, S.C. testified that the locked door separating the parkade from the elevator did not work throughout the tenancy and presented a security risk. In addition, S.C. testified the fridge in the Tenants' rental unit did not work properly.

Second, the Landlord claimed \$2,350.00 for unpaid rent that was due on October 1, 2018. Again, K.M. testified the Tenants agreed the new tenancy would begin on November 1, 2018, and that the Tenants understood they were obligated to pay rent for the month of October 2018.

In reply, S.C. testified to his belief that the rental market was good at the time and that the rental unit should not have remained vacant until November 1, 2018.

The Tenants' Claim

The Tenants sought the return of the security deposit held by the Landlord in the amount of \$1,175.00. On behalf of the Tenants, S.C. testified that the Tenants forwarding address was provided in an email dated December 11, 2018. A copy of the email was submitted with the Tenants' documentary evidence.

In reply, K.M. agreed the forwarding address was received on December 11, 2018, and noted that the Landlord's Application was made on December 20, 2018, 9 days after receipt of the Tenants' forwarding address.

Analysis

Based on all of the above, the evidence and testimony, and on a balance of probabilities, I find as follows.

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

The Landlord's Claim

With respect to the Landlord's claim for \$587.50, Policy Guideline #4 provides assistance when determining whether or not a landlord is entitled to rely on a liquidated damages clause. It 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 clause is a valid liquidated damage clause. Considering the non-exhaustive list of factors provided, I find the amount claimed is not a penalty and is not oppressive as it represents only 1/4 of the rent paid by the Tenants. Therefore, I find the Landlord is entitled to a monetary award for liquidated damages in the amount of \$587.50.

With respect to the Landlord's claim for unpaid rent in the amount of \$2,350.00 for rent due for October 2018, I find the Landlord has demonstrated an entitlement to this amount. I accept the testimony of K.M., who confirmed the Tenants elected to proceed with the new tenancy that began on November 1, 2018, rather than wait to see if a new tenant could be found earlier. I find there was insufficient evidence adduced to satisfy me the Landlord failed to take reasonable steps to minimize losses and re-rent the unit as soon as possible.

With respect to the submissions of S.C. regarding concerns such as the lock on the door between the parkade and the elevator, and the operation of the fridge, I find these did not amount to a breach of the tenancy agreement that gave the Tenants a right to end the fixed-term tenancy. The Tenants were at all times at liberty to make an application to the Residential Tenancy Branch for an order that repairs be completed or for a loss of services or amenities, for example. They did not do so.

Based on the above, I find the Landlord has demonstrated an entitlement to a monetary award in the amount of \$2,937.50, which is comprised of \$587.50 in liquidated damages and \$2,350.00 in unpaid rent.

The Tenants' Application

With respect to the Tenants' claim for the recovery of the security deposit, I accept there was no obligation on the Landlord to repay the security deposit to the Tenants. In accordance with section 38 of the Act, the Landlord submitted the Landlord's Application within 15 days after receipt of the Tenants' forwarding address in writing on December 11, 2018.

Further, in light of my findings above, I find it is appropriate to apply the security deposit held in partial satisfaction of the Landlord's claim. Therefore, I find that the Tenants' Application for the return of the security deposit is dismissed, without leave to reapply.

Summary of Claims

The Landlord has demonstrated an entitlement to a monetary award in the amount of \$2,937.50. Having been successful, I also find the Landlord is entitled to recover the \$100.00 filing fee paid to make the Landlord's Application. Further, I find it is appropriate in the circumstances to order that the security deposit held be applied in partial satisfaction of the Landlord's claim.

Pursuant to section 67 of the *Act*, the Landlord is granted a monetary order in the amount of \$1,862.50, which has been calculated as follows:

Item	Amount
Liquidated damages:	\$587.50
Unpaid rent:	\$2,350.00
Filing fee:	\$100.00
<i>LESS</i> security deposit:	(\$1,175.00)
TOTAL:	\$1,862.50

The Tenants' Application is dismissed, without leave to reapply.

Conclusion

The Landlord is granted a monetary order in the amount of \$1,862.50. The order may be filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

The Tenants' Application is dismissed, without leave to reapply.

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: April 12, 2019

Residential Tenancy Branch