



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding CASCADIA APARTMENT RENTALS LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNRL-S, FFL

Introduction

On May 15, 2019, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for unpaid rent pursuant to Section 67 of the *Residential Tenancy Act* (the “*Act*”), seeking a Monetary Order for compensation pursuant to Section 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

T.J. attended the hearing as an agent for the Landlord; however, the Tenant did not make an appearance at the hearing. All parties in attendance provided a solemn affirmation.

T.J. advised that she served the Tenant the Notice of Hearing package by registered mail on May 16, 2019; however, she did not have the receipt with her nor did she submit it as documentary evidence. Based on this solemnly affirmed testimony, in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Tenant was deemed to have received the Landlord’s Notice of Hearing package five days after it was mailed.

She advised that she served evidence to the Tenant by registered mail on August 12, 2019. However, as service of this evidence did not comply with the timeframe requirements of Rule 3.14 of the Rules of Procedure, this evidence was excluded and not considered when rendering this decision. She was given the opportunity to provide testimony with respect to this evidence during the hearing, however.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for unpaid rent?
- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

T.J. stated that, as per the written tenancy agreement signed April 10, 2019, the tenancy was supposed to start on May 8, 2019 as a fixed term tenancy of one year. However, the Tenant did not move into the rental unit. Rent was established at \$1,250.00 per month, due on the first day of each month. A security deposit of \$625.00 was also paid.

She stated that the Tenant did not move into the rental unit on May 8, 2019 so she called him but she did not receive an answer. She called him again on May 9, 2019 and did not receive a response. On May 10, 2019, she called him and he advised her that he had changed his mind and he would not be moving in. She advised that he met with her later that day, he signed a notice to end his tenancy effective immediately, and that as part of this document, he authorized her to keep his security deposit.

She submitted that once the Tenant signed the notice to end his tenancy, she took steps to mitigate this loss by immediately advertising the rental unit online and on the company's listing website. She advised that due to the late notice, she could not find new tenants for May 15, 2019 and was only able to secure new tenants for June 1, 2019 after showing the rental unit many times. She advised that the Landlord is seeking liquidated damages in the amount of **\$625.00** as a cost to re-rent the place, as per the tenancy agreement. In addition, she is seeking compensation in the amount of **\$967.74** for the lost pro-rated rent from May 8 – May 31, 2019.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this decision are below.

Section 38 of the *Act* outlines how the Landlord must deal with the security deposit at the end of the tenancy. However, as the Landlord had written authorization from the Tenant to keep the deposit, pursuant to Section 38(4)(b) I am satisfied that the Landlord complied with the requirements of the *Act* and the doubling provisions do not apply to the deposit.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Regarding the Landlord's claim for lost rent, there is no dispute that the parties entered into a fixed term tenancy agreement from May 8, 2019 ending April 30, 2020, yet the tenancy effectively ended when Tenant did not take possession of the rental unit on May 8, 2019 and provided a signed, written letter ending the tenancy. Sections 44 and 45 of the *Act* set out how tenancies end and also specifies that the Tenant must give written notice to end a tenancy. As well, this notice cannot be effective earlier than the date specified in the tenancy agreement as the end of the tenancy.

Given that the Tenant's notice to end the tenancy was effective for a date earlier than the end of the fixed term tenancy, I am not satisfied that the Tenant ended the tenancy in accordance with the *Act*. Therefore, I find that the Tenant gave up vacant possession of the rental unit contrary to Section 45 of the *Act*. Moreover, I find that the testimony indicates that as a result of the Tenant's actions, the Landlord could have suffered a rental loss.

I find it important to note that Policy Guideline # 5 outlines a Landlord's duty to minimize their loss in this situation and that the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. Additionally, in claims for loss of rental income in circumstances where the Tenant ends the tenancy contrary to the provisions of the Legislation, the Landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit.

With respect to the Landlord's request for liquidated damages, I find it important to note that Policy Guideline # 4 states that 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" and that the "amount agreed to must be a

genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

Based on the testimony before me, I am satisfied that there was a liquidated damages clause in the tenancy agreement that both parties had agreed to, and that the genuine pre-estimate of loss does not meet the tests for establishing this amount as a penalty. Furthermore, the policy guideline states that "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." In this instance, I find that ending a tenancy with such short notice would put the Landlord in a position where efforts to re-rent the premises would be considered sufficiently more than "negligible or non-existent". As such, I am satisfied that the Landlord mitigated her losses and that the Landlord has sufficiently established this claim. As such, I grant a Monetary Order in the amount of **\$625.00** for the liquidated damages.

Furthermore, I am satisfied that the Tenant did not end the tenancy in accordance with the *Act*. In addition, given that his notice was provided on May 10, 2019 effective immediately, I also find that the Tenant gave the Landlord minimal written notification that he was ending the tenancy.

I am satisfied from the S.J.'s testimony that she made attempts to re-rent the rental unit as quickly as possible after receiving this short notice on May 10, 2019. As she was able to re-rent the rental unit on June 1, 2019, I am satisfied that the Tenant is responsible for the portion of May 2019 rent that was lost. Consequently, I grant the Landlord a Monetary Order in the amount of **\$967.74** to satisfy the Landlord's loss for rent owing for the month of May 2019.

As the Landlord was successful in her claims, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this application. Under the offsetting provisions of Section 72 of the *Act*, I allow the Landlord to retain the security deposit in partial satisfaction of the amount awarded.

Pursuant to Sections 67 and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenant to the Landlord

May 2019 rental loss	\$967.74
Liquidated damages	\$625.00
Recovery of filing fee	\$100.00
Security deposit	-\$625.00
TOTAL MONETARY AWARD	\$1,067.74

Conclusion

The Landlord is provided with a Monetary Order in the amount of **\$1,067.74** in the above terms, and the Tenant must be served with **this Order** as soon as possible. Should the Tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and 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: August 26, 2019

Residential Tenancy Branch