



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DR. FRANK K.K. CHIU INC. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDC-S, MND-S, FF

Introduction

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

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover its filing fee for this application from the tenant pursuant to section 72.

The landlord's agent (the landlord) attended the hearing via conference call and provided affirmed testimony. The tenant did not attend or submit any documentary evidence. The landlord stated that he wished to have an agent appear on his behalf due to a scheduling conflict with another dispute resolution hearing. The landlord stated that the tenant was served with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on July 24, 2019. The landlord also served an amendment to the application for dispute increasing the monetary claim to \$7,978.70 on August 26, 2019 via Canada Post Registered Mail. The landlord provided two Canada Post Customer Receipt Tracking numbers (noted on the cover of this decision) and referred to the submitted copies of the Canada Post Tracking labels as confirmation. After waiting 10 minutes past the start of the scheduled hearing with no appearance by the tenant, the hearing began in his/her absence.

Although the tenant failed to attend or submit any documentary evidence, the tenant is deemed served as per section 90 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage, for money owed or compensation and recovery of the filing fee?

Is the landlord entitled to retain all or part of the security deposit?

Background and Evidence

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 / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on April 5, 2019 on a fixed term tenancy until April 30, 2020 as per the submitted copy of the signed tenancy agreement dated April 5, 2019. The monthly rent was \$2,800.00 payable on the 1st day of each month. A \$1,400.00 security deposit was paid on April 5, 2019.

The landlord seeks an amended monetary claim of \$7,978.70 which consists of:

\$5,600.00	Liquidated Damages
\$1,386.00	Repair for Damaged Cupboard
\$379.77	Repair for window frame and wall paint
\$105.00	Filing Fee, Property Management/Residential Tenancy Branch
\$138.60	Re-Key unit lock
\$158.51	Replace Grill Grid, filter, filter grease
\$80.90	paint material cost
\$89.97	cleaning solvents, putty granite sealant
\$39.95	repair kit for granite

The landlord claims that the tenant vacated the rental unit leaving it damaged with the above noted issues. The landlord claims that the kitchen cabinet was burned and damaged requiring replacement; the tenant lost a unit key and strata common area key requiring the re-keying of the unit lock; repairs to a damaged wall and window frame; replacement of a rangehood grease filter, cleaning of the microwave and a damaged countertop requiring repairs.

The landlord describes the liquidated damages clause #12 as it states in part,

12. The tenant agrees not to assign or sublet the premises without the Landlord's written permission and consent. If Tenant terminates the Agreement, or causes the Landlord to terminate the Agreement by breaching its terms, before he expiry date, the Tenant Agrees to give the Landlord 5 weeks prior written notice and liquidated damages (not as a penalty) of one and one half months (1 ½) rent (\$4,200.00) to the Landlord for anticipated reletting expenses (1/2 month) and rental loss (1 month). This amount is due immediately upon receipt of notice to vacate. Further, if Strata Bylaw stipulates a minimum rental period and Tenant vacates the property prior to fulfilling the requirement, it will be considered as contravention of Bylaws and subject to fines which Tenant agrees to pay immediately following Tenant's notice to vacate.

The landlord stated that ½ of the monthly rent equal to \$1,400.00 is an amount payable by the owner to the landlord's agent as a fee to obtain a new tenant for the landlord/owner. The landlord also stated that the remaining 1 months rent equal to \$2,800.00 is the anticipated loss of rent incurred by the landlord/owner.

The landlord claims that the rental unit was "brand new" and the tenant was the first occupant.

The landlord has submitted a 46 page condition inspection report for the move-in which was completed by both parties on April 5, 2019. This report provides a detailed description and photographs throughout.

The landlord has also submitted a 51 page condition inspection report for the move-out which was completed on July 5, 2019. This report provides a detailed description and photographs throughout.

The landlord has submitted copies of invoices, receipts and detailed emails

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to

prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In this case, I accept the undisputed evidence of the landlord and find that a claim has been established. However, the landlord's claim for liquidated damages of \$5,600.00 is dismissed.

Residential Tenancy Branch Policy Guideline #4, Liquidated Damages states in part,

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of 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 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.

In this case, clause #12 of the signed tenancy agreement provides for 1 ½ months compensation equal to \$4,200.00 as liquidated damages which the landlord clarified as ½ months compensation (\$1,400.00) equal to the service fee charged by the property management company to obtain a new tenant. The 1 month compensation (\$2,800.00) portion as liquidated damages was clarified by the landlord as loss of rental income for a 1 month period. I find that this term is misleading and does not reflect what true genuine pre-estimated costs were at the time of signing the tenancy agreement. These are costs normally associated in re-renting the unit. As such, I find that the landlord's "liquidated damages clause" is deemed to be a penalty and is unenforceable. This portion of the landlord's claim is dismissed.

The landlord has provided sufficient undisputed evidence on the remaining issues to establish a total claim of \$3,778.70.

However, I note during the hearing that the landlord's agent clarified that the \$105.00 claim for recovery of a Residential Tenancy Branch Filing Fee from the tenant included a \$5.00 charge for taxes which the landlord's agent was passing on to the tenant. I find that this is not appropriate as section 72 of the Act addresses **Director's orders: fees and monetary order**. With the exception of the filing fee for an application for dispute resolution, the Act does not provide for the award of costs associated with litigation to either party to a dispute. Accordingly, the Landlord's claim for recovery of litigation costs (tax on the filing fee) is dismissed.

I authorize the landlord to retain the \$1,400.00 security deposit in partial satisfaction of this claim.

Conclusion

The landlord is granted a monetary order for \$2,378.70.

This order must be served upon the tenant. Should the tenant fail to comply with this order, the 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: October 31, 2019

Residential Tenancy Branch

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