



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

FFL MNDCL-S MNRL-S

Introduction

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

- 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;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of \$1,525 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The landlord was represented by an agent ("**TG**") at the hearing. Three of the four tenants attended the hearing and were authorized to represent the fourth. All parties were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

TG testified, and the tenants confirmed, that the landlord served the tenants with the notice of dispute resolution form and supporting evidence package. The tenants testified, and TG confirmed, that the tenants served the landlord with their evidence package. I find that all parties have been served with the required documents in accordance with the Act.

Issue(s) to be Decided

Is the landlord entitled to:

- 1) withhold the security deposit in partial satisfaction of the orders sought;
- 2) a monetary order of \$1,525; and
- 3) recover his filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the parties, not all details of their submissions and arguments are reproduced here. The relevant and important aspects of the parties' claims and my findings are set out below.

The parties entered into a written, fixed-term tenancy agreement starting August 1, 2018 and ending July 31, 2019. The parties agree that the tenants vacated the rental unit on April 29, 2019. Monthly rent was \$1,325 and was payable on the first of each month. The tenants paid the landlord a security deposit of \$662.50 and a pet damage deposit of \$662.50. At the end of the tenancy, the parties entered into a written agreement whereby the landlord was permitted to retain \$331.25 of the security deposit (the details of this agreement will be discussed below). The landlord returned the balance of the deposit on May 26, 2019.

The parties agree that the tenants vacated the rental unit in advance of the end date of the fixed-term tenancy agreement.

The Landlord's Position

TG testified that the tenants moved due to "change of life circumstances" relating to their schooling. The tenants did not dispute this. On March 29, 2019 the tenants notified the landlord of their intention to move. TG replied via to the tenants that same day. He, in part, wrote:

The act states that if you want to break your lease without owner permission, there are penalties ...

- A) There is a liquidated damages clause that says that you will have to pay 1 /2 one months rent which the cost of re-renting the property. It states this in the addendum on point 6.
- B) There is an administration fee of \$200
- C) I would attempt to re rent the property. I feel I could do this with 1 months notice.. But in the event I couldn't rent it for when you moved out.. you would be on the hook to pay the rent until I rent it to somebody else until your lease would have ended.

The tenancy agreement contains an addendum which includes the following clause:

6. Ending the Tenancy

Should the tenancy agreement be terminated for any reason prior to the agreed length of stay (see page 2 of tenancy agreement for length of tenancy), an administration fee of \$200.00 will automatically apply. The tenant may be liable to pay Vantage West Realty for a pro-rated amount of rent and any additional costs to re-rent the property. Early termination of a lease will require the tenant to pay a “placement fee” to find a new tenant, which is equivalent to ½ month’s rent.

TG testified that he immediately attempted to re-rent the rental unit and, on April 10, 2019, TG secured a new renter to move in May 15, 2019. He testified that he tried to get a renter for May 1, 2019 but was unable to do so.

TG testified that on April 29, 2019, he conducted a move-out inspection with the tenants, and that the rental unit was very clean. He testified that he advised the tenants of clause 6 of the addendum and asked if he could deduct \$862.50 (\$200.00 plus ½ month’s rent) from the tenant’s security and pet damage deposit to satisfy the amount proscribed in clause 6 of the addendum (the “**Liquidated Damages**”).

TG testified that the tenants refused, and he “negotiated” an amount with the tenants that he could deduct from the deposits. He testified that the tenants agreed he could deduct the \$331.25 from the deposits. He testified that it was not his intention that this deduction would be in full satisfaction of the Liquidated Damages, but rather that it would represent a partial payment of that amount.

The parties did not write down the terms of the agreement, beyond recording on the move-out inspection report that the landlord could retain \$331.25 of the security deposit.

TG testified that when he advised the landlord of this agreement, the landlord instructed him to make this application to collect the balance of the Liquidated Damages.

At the hearing, the landlord withdrew its claim for the \$200 “administration fee” authorized by clause 6 of the addendum. The landlord persisted in its claim for a “placement fee” of half a month’s rent.

TG testified that the “placement fee” was intended to compensate the landlord for costs associated with advertising the rental unit, vetting potential renters, showing the rental unit, and preparing tenancy agreements and other office tasks.

TG argued that the landlord is entitled to compensation in the amount of \$662.50 for the loss of rental income from May 1 to May 15, 2019 caused by the tenants early ending of the tenancy, and \$662.50 as the “placement fee” which should be considered the landlord’s liquidated damages associated with re-renting the rental unit.

Tenant’s Position

Landlord’s Loss of Income

The tenants agree that they ended the tenancy before the end date listed on the tenancy agreement. They argue that the landlord did not do all that was required of him to minimize his damages. They submitted that the landlord should not have accepted a tenant would rent the rental unit starting May 15, 2019, and rather should have continued to look for a tenant that could have occupied the rental unit on May 1, 2019. Accordingly, they argued, the landlord failed to mitigate its damages.

Liquidated Damages

Both tenant AG and tenant GG testified that they understood the agreement reached on April 29, 2019 was that the landlord would waive its right to collect the Liquidated Damages in exchange for being permitted to retain \$331.25 of the security deposit. They testified that, at no time, did TG advise them that the landlord reserved his right to collect the balance of the Liquidated Damages.

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and

- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

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.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

So, the landlord must prove, on a balance of probabilities, that the tenants breached the Act or tenancy agreement, and that this breach caused him loss or damage. The landlord must also prove that he acted reasonably to minimize its loss or damage.

Loss of Rental Income

Section 45 of the Act sets out how a tenant may end a fixed term tenancy:

Tenant's notice

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Based on the evidence presented by the parties, I find that the manner in which the tenants ended the tenancy did not meet with either of these permitted methods. The tenants vacated the rental unit prior to the end date listed in the tenancy agreement, and the basis for their leaving was not due to the landlord's breach of a material term of the tenancy agreement. As such, I find that the tenants breached the Act.

I find that the landlord was not able to re-rent the rental unit until May 15, 2019, 15 days after the tenants vacated the rental unit. I accept that the landlord suffered damage in the amount of \$662.50, representing a half month's rent, as the result of the tenant's breach of the Act.

I find that by re-renting the rental unit by May 15, 2019, the landlord acted reasonably to minimize his damages. I do not find that it was unreasonable for the landlord to have accepted a tenant that could only move on May 15, 2019. It is not unreasonable for him to be concerned that, should he reject the tenant who could move in on May 15, 2019, he might not be able to find a tenant who could move in on May 1, 2019.

Indeed, if the landlord did reject the May 15, 2019 tenant, and was not able to find another tenant, I would likely find such conduct to be unreasonable, and would likely find that the landlord failed to reasonably minimize his loss.

As such, I order that the tenants pay the landlord \$662.50.

Liquidated Damages

When parties enter into verbal agreements to vary a tenancy agreement, it is not uncommon for the parties to later disagree as to what the terms of that agreement are. In this instance, the parties have testified that an agreement was reached with regards to the security deposit as it related to the Liquidated Damages.

As the parties have given conflicting testimony as to the terms of the agreement, I must assess the parties' credibility. A useful guide in that regard, and one of the most frequently used in cases such as this, is found in *Faryna v Chorny* (1952), 2 DLR 354 (BCCA), which states at pages 357-358:

The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances.

[emphasis added]

Applied to the case at hand, I find that the tenants' testimony regarding the terms of the April 29, 2019 agreement to be more in harmony with the preponderance of probabilities than TG's.

I find that TG's accounting of the terms of the agreement describes an agreement from which the tenants derive no benefit. Under the usual course, if a landlord believes a tenant has breach the tenancy agreement, and owes them liquidated damages, the landlord must commence the process of a making an application for dispute resolution. They are not permitted to withhold the security deposit unilaterally. Then, if they are successful in their application for dispute resolution (of which there is no guarantee), the landlord would need to recover their damages from the tenant (which can be time consuming).

If I find TG's version of the terms of the agreement to be true, then this would mean that the tenants, at no benefit to themselves, permitted the landlord to recover portion of a potential, future monetary award and also reserve the right to collect the balance of this potential, future monetary award at a later date. The agreement would put the tenants in a worse possession than if they had entered into no agreement at all. I do not think it probable or reasonable that the tenants would make such an agreement.

The tenants' accounting of the terms of the agreement appear to be more reasonable. Under this version, TG, acting on behalf of the landlord, agreed to accept a lesser amount of liquidated damages right away in exchange for avoiding the uncertainty of an application for dispute resolution and the risk of being unable to collect on a monetary order, should the landlord be successful. This is not unreasonable. Similarly, under the tenants' version of the agreement, the tenants acted reasonably to mitigate their risk. They agreed to pay a fixed, lesser amount immediately, rather than risk that they might have to pay a larger amount later.

Of these two versions, I find it more likely that the parties would have entered into the tenants' version. Accordingly, I find that the tenants' testimony is more in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those circumstances. As such, I favour the tenants' testimony of that of TG's.

I find that the landlord agreed that it could withhold \$332.50 of the security deposit in full satisfaction of any claim it might have for the Liquidated Damages. Accordingly, I dismiss the landlord's application to recover the Liquidated.

As the landlord has been partially successful in his application, I order that he may recover his filing fees.

As the landlord has already returned the balance of the security deposit to the tenants, I cannot order that he may retain a portion of it in satisfaction of the monetary orders I have made in their favour.

Conclusion

I order the tenants to pay the landlord \$762.50, representing the following:

Compensation for loss of rental income (May 1 to May 15, 2019)	\$662.50
Filing Fee	\$100.00
Total	\$762.50

This order may be filed and enforced in the Provincial Court of British Columbia.

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 21, 2019

Residential Tenancy Branch