



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ALLISON APARTMENTS INC
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFL MNDCL-S MNRL-S

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution, made on September 9, 2019 (the "Application"). The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for compensation;
- a monetary order for unpaid rent;
- to retain the security deposit; and
- an order granting recovery of the filing fee.

The Tenants, the Tenant's Representative, D.O., and the Landlord's Agent T.H. attended the hearing at the appointed date and time and provided affirmed testimony.

T.H. testified that she served the Application and documentary evidence package to the Tenants by registered mail on September 15, 2019. The Tenants confirmed receipt. The Tenants stated that they served the Landlords with their documentary evidence by registered mail on December 17, 2019. T.H. confirmed receipt. Pursuant to section 88 and 89 of the *Act*, I find the above documents were sufficiently served for the purposes of the *Act*.

The parties were given an opportunity to present 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. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order for compensation, pursuant to Section 67 of the *Act*?
2. Is the Landlord entitled to a monetary order for unpaid rent, pursuant to Section 67 of the *Act*?
3. Is the Landlord entitled to retain the security deposit, pursuant to Section 38 and 72 of the *Act*?
4. Is the Landlord entitled to recover the filing fee, pursuant to Section 72 of the *Act*?

Background and Evidence

The parties testified and agreed to the following; the fixed term tenancy began on September 1, 2018 and was meant to end on August 31, 2019. Rent in the amount of \$2,600.00 was due to the Landlord on the first day of each month. The Tenants paid a security deposit in the amount of \$1,300.00 which the Landlord continues to hold. The Tenancy ended on April 30, 2019 after the Tenants moved out of the rental unit. The Landlord submitted a copy of the tenancy agreement in support.

The parties agreed that the Tenants provided the Landlord with written notice to end tenancy on January 4, 2019 with an effective date of April 30, 2019. T.H. stated that she advised the Tenants that they would be responsible for paying the liquidated damages for ending the tenancy early, however, they would be permitted to sublet the rental unit. The Tenants stated that they found two individuals who were interested in taking over the rental unit, however, this did not happen before the Tenants moved out of the rental unit on April 30, 2019.

T.H. testified that the Landlord is seeking \$5,600.00 for liquidated damages. T.H. stated that the parties agreed at the start of the tenancy that if the Tenants were to end the fixed term tenancy early, that they would be responsible for paying the liquidated damages. T.H. stated that the liquidated damages amount has always been twice the amount of the monthly rent. T.H. could not specify what costs, if any, were incurred in re-renting the rental unit.

T.H. stated that the Landlord is also seeking \$10,400.00 as the Landlord was unable to re-rent the rental unit until September 1, 2019. As such, the Landlord is seeking the lost

rent for May, June, July and August 2019 as a result of the Tenants breaking the fixed term agreement by moving out early. T.H. stated that she posted an advertisement for the rental unit in March 2019, however, the school semester was just ending, therefore, the interest for a rental unit was diminished at this time.

The Tenants responded by stating that the liquidated damages clause represents a penalty rather than a genuine pre estimate of the cost associated with re-renting the rental unit. The Tenants stated that they had found two potential tenants for the rental unit and that the Landlord did not respond to the inquiries. The Tenants also stated that the advertisement placed by the Landlord was for a different rental unit, which had a different address as well as different pictures which did not correspond with the rental unit. The Tenants stated that their building and rental unit was nicer than the one advertised in the advertisement. As such, the Tenants argue that the Landlord did not mitigate their loss.

The Landlord is seeking to retain the Tenants' security deposit in partial satisfaction of their claims. The parties agreed that the Tenants provided their forwarding address to the Landlord on August 14, 2019 and again on September 6, 2019. The Tenants stated that they have not consented to the Landlord retaining any portion of their deposit.

If successful, the Landlord is also seeking the return of the filing fee paid to make the Application.

Analysis

Based on the affirmed oral testimony and documentary evidence, and on a balance of probabilities, I find:

According to the Residential Policy Guideline #4; 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.

The Landlord is seeking \$5,600.00 for liquidated damages. T.H. testified that the liquidated damages clause which is typically twice the amount of the monthly rent. I find that T.H. could not explain the costs associated with re-renting the rental unit. I find that the Landlord provided insufficient evidence to demonstrate that the liquidated damages

clause in the tenancy agreement in the amount of \$5,600.00 is genuine pre estimate of the loss at the time of the contract was entered into. Rather, I find that the clause constitutes a penalty, as it is extravagant in comparison to the greatest loss that could follow a breach; therefore, I render the clause unenforceable.

In light of the above, I dismiss the Landlord's claim to recover \$5,600.00 for liquidated damages without leave to reapply.

The Landlord is claiming \$10,400.00 as they were unable to re-rent the rental unit for the Month of May, June, July and August 2019 as a result of the Tenant ending the fixed term tenancy early.

According to the Residential Tenancy Policy Guideline #30 (the "Policy Guideline"); during the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties. A tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Legislation. Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

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*. Pursuant to Residential Tenancy Policy Guideline #16 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 the Landlord to prove the existence of the damage or loss, and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlord must

then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the Landlord did what was reasonable to minimize the damage or losses that were incurred.

I accept that the parties entered into a fixed term tenancy which was meant to end on August 31, 2019. The parties agreed that the Tenant provided their notice to end tenancy to the Landlord on January 4, 2019 indicating that the tenancy will end on April 30, 2019. I accept that the Landlord had advertised to re rent the rental unit in March 2019; however, was unable to find a new tenant until September 1, 2019. I find that the Tenants were not entitled to end the fixed term tenancy early.

While the Tenants breached the fixed term tenancy, I find that the Landlord failed to mitigate their loss. I accept that the Landlord advertised a different rental unit in their advertisement which did not match the address or specification to that of the rental unit. Furthermore, I find that the Landlord had raised the amount of rent for the rental unit to \$3,200.00 instead of \$2,600.00 which had been the amount of rent the Tenants were required to pay during their tenancy.

In light of the above, I find that the Landlord is entitled to monetary compensation for one month of rent in the amount of \$2,600.00 due to the fact that the Tenants breached the fixed term tenancy. I dismiss the remaining amount of unpaid rent without leave to reapply as the Landlord failed to mitigate their loss.

The Landlord has applied to retain the Tenants' security deposit in relation to their monetary claims.

Section 38(1) of the *Act* requires a landlord to repay deposits or make a claim against them by filing an application for dispute resolution within 15 days after receiving a tenant's forwarding address in writing or the end of the tenancy, whichever is later. When a landlord fails to comply with section 38(1) of the *Act*, and does not have authority under sections 38(3) or 38(4) of the *Act* to withhold any deposits, section 38(6) stipulates that a tenant is entitled to receive double the amount of the security deposit.

I accept that the parties agreed that the Tenants vacated the rental unit on April 30, 2019 and provided the Landlord with their forwarding addresses August 14, 2019 and September 6, 2019.

As there is no evidence before me that the Landlord was entitled to retain all or a portion of the security deposit under sections 38(3) or 38(4) of the *Act*, I find pursuant to section 38(1) of the *Act*, that the Landlord had until August 29, 2019, to repay the deposit or make an application for dispute resolution after receiving the first Tenant's forwarding address. I find that the Landlord submitted their Application for dispute resolution on September 9, 2019 which is outside of the 15 days permitted under the *Act*.

In light of the above, and pursuant to section 38(6) of the *Act*, I find the Tenants are entitled to an award of double the amount of the security deposit paid to the Landlord (\$1,300.00 x 2 = \$2,600.00).

As the Landlord was partially successful with their Application, I find that they are entitled to the return of the \$100.00 filing fee.

Set-off of Claims

The Landlord has demonstrated an entitlement to a monetary award of \$2,700.00. The Tenants have demonstrated an entitlement to a monetary award of \$2,600.00.

Setting of the parties' claims, and pursuant to section 67 of the *Act*, I grant the Landlord with a monetary award in the amount of \$100.00 (\$2,700.00 - \$2,600.00 = \$100.00).

The Landlord currently holds the Tenants security deposit in the amount of \$1,300.00. I find it appropriate in the circumstances to order that the Landlord retain \$100.00 from the Tenants' security deposit and return the remaining balance to the Tenants in the amount of \$1,200.00 (\$1,300.00 - \$100.00 = \$1,200.00).

The Tenants are therefore granted a monetary order in the amount of \$1,200.00 which represents the remaining balance of their security deposit after the above-mentioned deduction.

Conclusion

The Tenants have breached the fixed term tenancy. The Landlord breached Section 38 of the *Act*. Following the set off claims, the Tenants are granted a monetary order in the amount of \$1,200.00 which represents the remaining balance of their security deposit. The monetary order should be served on the Landlord as soon as possible and may be

filed in and enforced as an order of the Provincial Court of British Columbia (Small Claims).

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: January 15, 2020

Residential Tenancy Branch