



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding SURREY VILLAGE
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, FFL

Introduction

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed on November 7, 2019, in which the Landlord requested monetary compensation from the Tenant including payment of liquidated damages and loss of rent, authority to retain his security deposit and to recover the filing fee.

The hearing was conducted by teleconference at 1:30 p.m. on March 26, 2020. Both parties called into the hearing and were provided the opportunity to present their evidence orally and in written and documentary form and to make submissions to me. The Tenant's father, A.S., also called into the hearing.

The parties agreed that all evidence that each party provided had been exchanged. No issues with respect to service or delivery of documents or evidence were raised. I have reviewed all oral and written evidence before me that met the requirements of the *Residential Tenancy Branch Rules of Procedure*. However, not all details of the parties' respective submissions and or arguments are reproduced here; further, only the evidence specifically referenced by the parties and relevant to the issues and findings in this matter are described in this Decision.

Preliminary Matters

The parties confirmed their email addresses during the hearing as well as their understanding that this Decision would be emailed to them.

Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenant?

2. Should the Landlord be authorized to retain the Tenant's security deposit?
3. Should the Landlord recover the filing fee?

Background and Evidence

A copy of the residential tenancy agreement was provided in evidence and which provided as follows: this fixed term tenancy began March 1, 2019; monthly rent was \$1,725.00; and, the Tenant paid a security deposit of \$862.50.

M.T. testified that on October 30, 2019, the Tenant's father, A.S., informed the Landlord that the Tenant would be moving out of the rental property as of October 31, 2019.

M.T. further stated that they re-rented the rental unit as of February 2020. She stated that they took so long to re-rent the unit because it was a "luxury unit". She confirmed that they re-rented other units in the same building to others.

The Landlord sought the sum of \$400.00 for liquidated damages pursuant to clause 6 of the residential tenancy agreement which reads as follows:

6. 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 \$400 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 further rental revenue losses that will remain unliquidated.

The Landlord also sought monetary compensation for loss of rent for November 2019 in the amount of \$1,725.00.

In response to the Landlord's claim, the Tenant testified as follows. He stated that he gave written notice, by email, to end his tenancy on September 13, 2019. A copy of this email was provided in evidence, an email message from M.T. to the Tenant confirming her receipt of his email.

The Tenant also testified that he lived in the rental property with his father, A.S. When the Tenant gave notice to end his tenancy, the Tenant also informed the Landlord that

his father, A.S., wanted to stay in the rental unit, however, the Landlord and his father never confirmed a contract and his father moved out.

The Tenant also provided a copy of the rental ad placed by the Landlord; this ad indicated the rental unit was not available until December 1, 2019. The Tenant submitted that the Landlord should have advertised the rental unit sooner as the unit was available on November 1, 2019.

In reply, M.T. stated that as soon as they did the move out inspection on October 31, 2019, they advertised the rental unit. The Landlord did not provide a copy of this advertisement in evidence.

M.T. confirmed that they were not able to work things out to have the Tenant's father stay in the rental unit.

Analysis

In this section reference will be made to the *Residential Tenancy Act*, the *Residential Tenancy Regulation*, and the *Residential Tenancy Policy Guidelines*, which can be accessed via the Residential Tenancy Branch website at:

www.gov.bc.ca/landlordtenant.

In a claim for damage or loss under section 67 of the *Act* or the tenancy agreement, the party claiming for the damage or loss has the burden of proof to establish their claim on the civil standard, that is, a balance of probabilities. In this case, the Landlord has the burden of proof to prove their claim.

Section 7(1) of the *Act* provides that if a Landlord or Tenant does not comply with the *Act*, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results.

Section 67 of the *Act* provides me with the authority to determine the amount of compensation, if any, and to order the non-complying party to pay that compensation.

To prove a loss and have one party pay for the loss requires the claiming party to prove four different elements:

- proof that the damage or loss exists;

- proof that the damage or loss occurred due to the actions or neglect of the responding party in violation of the Act or agreement;
- proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- proof that the applicant followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed.

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

The Landlord seeks monetary compensation for liquidated damages and loss of rent for November 2019.

A fixed term tenancy agreement will often include a clause provided for “liquidated damages”. These damages are agreed upon by the parties prior to the tenancy beginning and are intended to be a pre-estimate of damages. The liquidated damages amount, *limits* and *predetermines* the damages flowing from the early end of the tenancy or a breach of a fixed term.

Although a tenancy agreement may include a liquidated damages clause which specifically provides that payment of liquidated damages does not preclude the landlord from claiming future rental revenue losses, such claims must arise from *different* breaches of the tenancy agreement or *Act* (such as not paying rent while occupying the unit or leaving the unit damaged to such an extent the Landlord is unable to re-rent the unit). These damages do not flow from the breach of the fixed term and are therefore not limited or predetermined by the liquidated damages amount.

This is set out in the *Residential Tenancy Branch Policy Guideline 4–Liquidated Damages* which reads in part as follows:

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.

In this case, the Landlord seeks both liquidated damages and loss of rent pursuant to the Tenant's breach of the fixed term; as set out above, this is not permitted.

The unpaid rent for November is a claim which flows from the breach of the fixed term, and pursuant to the tenancy agreement, the liquidated damages arising from this breach have been determined by agreement in advance at \$400.00.

I therefore find that the Landlord is only entitled to the liquidated damages amount of **\$400.00**. For the above reasons I dismiss the Landlord's claim for loss of rent for November 2019.

I note that even in the event I found the liquidated damages clause in the tenancy agreement did not preclude the Landlord from claiming loss of rent for November 2019, I would have dismissed this portion of the Landlord's claim for the following reasons.

The evidence confirms that only the Tenant and the Landlord were parties to the tenancy agreement. While the Tenant's father resided in the unit with the Tenant, he was not a Tenant, but an occupant. As such, when the Tenant gave notice to end this tenancy, the tenancy ended.

While the Tenant's father and the Landlord may have hoped to negotiate a new agreement whereby the Tenant's father would continue to reside in the rental unit, these negotiations were not binding on the Tenant, nor would they extend his tenancy beyond the effective date of his notice to end his tenancy.

The documentary evidence before me confirms the Landlord did not advertise the rental unit as available before December 1, 2019. In failing to advertise the unit to others for November 2019, I find the Landlord failed to mitigate their losses as required by section 7 of the *Act*. As such, I would have denied their claim for loss of rent for November 2019 on the basis the Landlord failed to take reasonable steps to minimize this loss.

As the Landlord has enjoyed partial success, I award them recovery of one half of the filing fee in the amount of **\$50.00**.

Conclusion

The Landlord's claim for liquidated damages in the amount of **\$400.00** is granted.

The Landlord's claim for loss of rent for November 2019 is dismissed.

The Landlord is entitled to recover one half of the filing fee.

The Landlord is authorized, pursuant to sections 38 and 72 of the *Act* to retain **\$450.00** from the Tenant's \$862.50 security deposit. The Landlord must return the balance of the deposit, namely **\$412.50**, to the Tenant. In furtherance of this, I grant the Tenant a Monetary Order in the amount of **\$412.50**. This Order must be served on the Landlord and may be filed and enforced in the B.C. Provincial Court (Small Claims Division).

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 7, 2020

Residential Tenancy Branch