



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Real Property Management Central and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL, MNRL-S

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution, made on January 15, 2020 (the "Application"). The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

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

The Landlord's Agent, A.P. as well as the Tenants attended the hearing at the appointed date and time and provided affirmed testimony. At the beginning of the hearing, the parties acknowledged receipt of their respective application package and documentary evidence. No issues were raised with respect to service or receipt of these documents during the hearing. Pursuant to section 71 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 unpaid rent, pursuant to Section 67 of the *Act*?
2. Is the Landlord entitled to a monetary order for compensation, pursuant to Section 67 of the *Act*?

3. Is the Landlord entitled to retaining the Tenants' security deposit, pursuant to Sections 38 and 67 of the Act?
4. Is the Landlord entitled to an order granting the recovery of 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, 2019 and was meant to continue at least until February 28, 2020. During the tenancy, the Tenants were required to pay rent in the amount of \$1,300.00 to the Landlord which was due on the first day of each month. The Tenants paid a security deposit in the amount of \$650.00, which the Landlord continues to hold. The Tenants moved out of the rental unit on November 10, 2019.

The parties agreed that the Tenants provided the Landlord with their notice to end tenancy on November 8, 2019, before moving out of the rental unit on November 10, 2019. The parties agreed that the Tenants breached the fixed term tenancy by moving out early, however, the Tenants paid the full amount of rent to the Landlord for November and December 2019 as the rental unit remained vacant after the Tenants moved out.

The Landlord's Agent stated that the Landlord is seeking \$650.00 for liquidated damages. The Landlord's Agent stated that the parties agreed to the term in the tenancy agreement that if the Tenants breached the fixed term tenancy, they would be responsible for paying liquidated damages which is equivalent to half a months' rent. The Landlord provided a copy of the tenancy agreement containing the liquidated damages clause in support. The Landlord's Agent stated that this clause is associated with the cost that the Landlord has incurred in relation to advertising and re-renting the rental unit.

In response, the Tenants stated that the Landlord would have incurred the cost of re-renting the rental unit at the end of the fixed term regardless if the Tenants moved out early or not. As such, the Tenants feel as though they should not be responsible for paying this amount.

The Landlord's Agent stated that despite his best efforts to advertise the rental unit, he was unable to find a new occupant to re-rent the rental unit until February 7, 2020. The Landlord provided a copy of the rental advertisement in support. The Landlord's Agent stated that typically it is more difficult to find new occupants for rental units in the winter months. As such, the Landlord is seeking compensation for the loss of rent for January

2020 as well as a prorated amount of rent from February 1 to 6, 2020 for a combined amount of lost rent in the amount of \$1,568.97.

The Tenants stated that they paid the rent for November and December 2019 while they were not occupying the rental unit. The Tenants stated that they felt as though the Landlord should have found a new occupant by January 2020. The Tenants stated that they searched for the rental advertisement in November and December 2019 and were unable to find the listing for the rental unit. Furthermore, the Tenants stated that they phoned the Landlord's place of business to inquire about any availabilities. The Tenants stated that they had difficulties reaching anyone and they were not notified that the rental unit was available. The Tenants questioned how much effort the Landlord put in to mitigate their loss of rental income and don't feel as though they should be responsible for paying any further rent to the Landlord.

The Landlord's monetary claim amounts to \$2,218.97. The Landlord is also seeking to retain the Tenants' security deposit towards their claim. If successful, the Landlord is also seeking the return of the filing fee.

The Tenants stated that they provided the Landlord with their forwarding address by email on November 8, 2019, which was acknowledged as having been received by the Landlord on the same date. The Tenants provided a copy of the email exchange in support. The parties agreed that the tenancy ended on November 10, 2019.

Analysis

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

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.

According to Section 45 of the *Act*, 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.

The Residential Tenancy Policy Guideline #30 states that 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.

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 \$650.00 for liquidated damages. I accept that the parties agreed to the liquidated damages clause in the tenancy agreement which was signed by both parties. I find that the Tenants were not entitled to ending the fixed term tenancy

early, therefore breached the Act. I find that the Landlord provided sufficient evidence to support the costs of re-renting the rental unit. As such, I find that the Landlord is entitled to a monetary award of \$650.00 for liquidated damages.

The Landlord is also seeking compensation for the loss of rent for January 2020 as well as a prorated amount of rent from February 1 to 6, 2020 for a combined amount of lost rent in the amount of \$1,568.97. I accept that the Landlord's Agent placed an advertisement for the rental unit, however, I also accept that Tenants testimony and evidence that they were unable to reach the Landlord to conduct a showing of the rental unit, therefore questioning the Landlord's attempts at mitigating their loss.

I find that the Landlord has provided insufficient evidence to demonstrate that any showings of the rental unit were conducted between the time the Tenants moved out of the rental unit November 10, 2019, to the and the time that the Landlord found a new occupant to move into the rental unit on February 7, 2020. As such, I find that the Landlord has provided insufficient evidence that they mitigated their loss of rent and therefore dismiss the Landlord's claim for loss of rent without leave to reapply.

As the Landlord has applied to retain the Tenants' security towards their claim, I must determine if the Landlord has complied with Section 38 of the Act. Section 38(1) of the Act requires a landlord to repay deposits or make an application to keep them by making 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. If a landlord fails to repay deposits or make a claim against them within 15 days, section 38(6) of the Act confirms the tenant is entitled to receive double the amount of the deposits.

In this case, I find that the Tenants provided sufficient evidence to demonstrate that the Landlord received the Tenants' forwarding address by email on November 8, 2019 by way of a return email confirming receipt. I accept that the parties agreed that the tenancy ended on November 10, 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 November 25, 2019, to repay the deposit or make an application for dispute resolution. I find that the Landlord submitted their Application on January 15, 2020, which is outside of the time limit set out in Section 38 of 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 ($\$650.00 \times 2 = \$1,300.00$).

Having been partially successful in their Application, I find that the Landlord is entitled to the return of the \$100.00 filing fee paid to make the Application.

Set-off of Claims

The Landlord has demonstrated an entitlement to a monetary award of \$750.00. The Tenants have demonstrated an entitlement to a monetary award of \$1,300.00.

Setting of the parties' claims, and pursuant to section 67 of the *Act*, I grant the Tenants with a monetary order in the amount of \$550.00 ($\$1,300.00 - \$750.00 = \550.00).

Conclusion

The Tenants are granted a monetary order in the amount of \$550.00. The monetary 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: June 10, 2020

Residential Tenancy Branch