Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

egarding PLAN A REAL ESTATE SERVICES LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNRL-S, FFL

Introduction

On May 15, 2020, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the "*Act*"), seeking to apply the security deposit towards these debts pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

The Landlord attended the hearing. The Tenant attended the hearing as well, with C.L. attending as her advocate. All parties in attendance provided a solemn affirmation.

The Landlord advised that she served the Notice of Hearing package to the Tenant on May 22, 2020 by registered mail, and the Tenant confirmed that she received this package. Based on this undisputed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Tenant was served the Landlord's Notice of Hearing package.

She also advised that she served her evidence to the Tenant by email on September 4, 2020, and that she was permitted to serve in this manner due to the State of Emergency Director's Orders. The Tenant acknowledged that she received this evidence; however, she stated that it was only served to her on September 11, 2020 and that it gave her too little time to respond. The Landlord was asked to confirm the date that she served this evidence. As well, she was informed that her evidence was uploaded onto the Residential Tenancy Branch Dispute Management System on September 11, 2020. The Landlord submitted proof of serving this evidence on September 4, 2020.

The Tenant advised that the Landlord was served her evidence by hand on September 16, 2020 in response to the Landlord's evidence. The Landlord confirmed that she received this package on that date.

When assessing whether or not this evidence will be accepted or excluded, I note that the Director's Order permitting email service of documents was rescinded on June 24, 2020. Furthermore, service of the Landlord's evidence on September 4, 2020 would not have complied with the timeframe requirements of Rule 3.14 of the Rules of Procedure. Despite this, the Tenant clearly submitted late evidence in response to the Landlord's late submissions. As both parties submitted late evidence, I have accepted both parties' evidence provided and will consider it when rendering this Decision.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards these debts?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy originally started on October 1, 2019 as a fixed term tenancy ending on March 31, 2020. As well, another fixed term tenancy agreement was signed on March 5, 2020. This was another six-month fixed term tenancy that would start on April 1, 2020 and end on October 31, 2020. However, the tenancy ended when the Tenant gave up vacant possession of the rental unit on April 30, 2020. Rent was established at $2,300.00 per month and was due on the first day of each month. A

security deposit of $1,150.00 was also paid. A copy of these tenancy agreements was submitted as documentary evidence.

Of note, these tenancy agreements were titled “Furnished Travel Accommodation Tenancy Agreement” and on page two of these agreements, it states the following:

1. APPLICATION OF THE RESIDENTIAL TENANCY ACT
    1) The Tenant agrees that the rental unit will only be occupied for the sole purpose of being utilized as vacation or travel accommodations. Use for any other purpose is explicitly prohibited. Accordingly, both the landlord and tenant acknowledge that the Residential Tenancy Act of British Columbia does not apply to the terms of this tenancy agreement or any addendums, changes of additions to these terms.
    2) Since the rental unit will only be utilized for vacation or travel accommodations, the landlord and tenant agree that the Residential Tenancy Branch of British Columbia is the inappropriate organization to settle any disputes arising from this agreement.
    3) If the landlord and tenant agree to 1) and 2), then they must both initial the boxes to the right.

The boxes noted above, in point three on the tenancy agreements, were initialed by both parties on both tenancy agreements. When the Landlord was asked about the nature of these tenancy agreements, she stated that she “believed” that this was rented to the Tenant because she had a job that required her to move. She also stated that the reasons she believed that the *Act* did not have jurisdiction over this tenancy were because it was a short-term rental and because the rental unit was furnished. She confirmed that she had no discussions with the Tenant about this being strictly for travel or vacation accommodation, nor were there any discussions that the *Act* would not apply to this rental unit. Despite her belief that the *Act* did not apply to this tenancy, she stated that she made this Application to “protect” herself, just in case.

The Tenant advised that there were no discussions about this being only for travel or vacation accommodation. In addition, she did not move into the rental unit for a job or for travel. She stated that this was her permanent home and that she received her mail there.

The parties were advised that I would reserve judgement about whether the Residential Tenancy Branch had jurisdiction over this tenancy and that I would continue to hear testimony about the Landlord’s claims in the event that I accepted jurisdiction.

All parties agreed that a move-in inspection report was conducted on October 1, 2019. As well, they agreed that a move-out inspection report was conducted on April 30, 2020 between B.H. and the Tenant. In addition, the Tenant's forwarding address in writing was noted on the bottom of the move-out inspection report.

The Tenant advised that she never received a copy of this move-out inspection report, despite asking B.H. for a copy after the inspection was conducted and subsequently asking the Landlord multiple times for a copy, on May 25, June 1, June 17, and August 23, 2020.

The Landlord advised that the person who conducted the move-out inspection report "should have given a copy to the Tenant". She stated that she was contacted twice by the Tenant but a request for a copy of this report was never made. She confirmed that the Tenant did contact her again in September 2020 for a copy of this report, and a copy was provided as part of the evidence package.

As she was not present for this move-out inspection, B.H. provided testimony with respect to the inspection that was conducted. He stated that at the end of the inspection, he advised the Tenant to take a picture of the move-out inspection report. As well, he stated that he did not give a copy of this report to the Tenant as she did not request one.

The Landlord advised that she is seeking compensation in the amount of **$945.00** as the cost of liquidated damages because the Tenant signed a fixed term tenancy starting on April 1, 2020 and ending on October 31, 2020. However, the Tenant gave written notice to end her tenancy in March 2020 and gave up vacant possession of the rental unit on April 30, 2020. She stated that the addendum to the tenancy agreement noted that this fee could be charged, but she acknowledged that there was no specific monetary value noted for this in the addendum. She advised that this amount is always calculated as half of the next tenant's rent.

The Tenant advised that she was surprised by this amount as it was never specifically indicated on the tenancy agreement and that she was confused by the Landlord's request for this.

The Landlord advised that she is seeking compensation in the amount of **$1,400.00** because the Tenant signed a fixed term tenancy starting on April 1, 2020 and ending on October 31, 2020, but then gave up vacant possession of the rental unit on April 30,

2020. She stated that she was able to re-rent the rental unit on May 16, 2020; however, she could only rent it for $1,800.00 per month, so the amount she is seeking is for the half month of rental loss that she suffered at the rent of $1,800.00 per month, plus the $500.00 that she had to reduce the rent by to mitigate her losses. She stated that she received the Tenant's notice to end the tenancy on March 31, 2020 and she advertised the rental unit right away. She notified the Tenant of potential showings on April 13, 20, 21, and 27, 2020.

The Tenant advised that she was informed that a new tenant would be moving in on May 1, 2020. She stated that she emailed the Landlord multiple times to ask if the rental unit had been re-rented, but she did not receive a response. As well, she noted that the Landlord did not submit a copy of the tenancy agreement of the new tenant to prove when it was rented or for how much.

Finally, the Landlord advised that she is seeking compensation in the amount of **$105.00** because the Tenant did not leave the rental unit in a re-rentable state and the unit required additional cleaning. She referenced the move-out inspection report which stated that there was "cleaning required"; however, she could not provide any answers about the actual condition of the rental unit at the end of the tenancy, what specific deficiencies existed as none were noted on the move-out inspection report, or what cleaning was performed. She stated that the Tenant agreed to cleaning as per the move-out inspection report and she referenced an invoice submitted to support her request for the amount claimed.

B.H. advised that the rental unit was a "little but dusty", that there were items left in the cupboards, and that the bathroom needed cleaning. However, he stated that he could not "remember specifics" as it was so long ago and that there was "nothing specific noted to show that the condition was awful". He stated that the rental unit required "just general wiping".

The Tenant advised that she spent hours cleaning and that the rental unit was only 490 square feet. She was told by B.H. that "nothing stood out"; however, she spent an additional half an hour wiping down surfaces in the rental unit. She acknowledged that she agreed to a deduction of $25.00 from her security deposit, but she submitted that the Landlord added "/hr min 4 hours" on the bottom of the move-out inspection report afterwards. In addition, she stated that the amount due back to the Tenant on the report indicated $1,125.00 originally; however, this was later changed by the Landlord to "0". These changes are obvious as the handwriting and the colour of the ink are different.

She advised that her position for this allegation is supported by an email she sent to the Landlord where she mentioned that she was expecting $1,125.00 to be returned to her.

B.H. stated that all of the penmanship on the move-out inspection report was his and that the ink was the same colour.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 4 of the *Act* states that the *Act* does not apply to living accommodation occupied as vacation or travel accommodation.

The first and foremost issue I must address is jurisdiction. While the Landlord maintained that the *Act* did not apply to this tenancy because it was a short-term rental and furnished, I find it important to note that there are no provisions in the *Act* which indicate that a short-term rental or a furnished unit would not be covered under the jurisdiction of the *Act*.

In turning my attention to the submitted tenancy agreements, while they are entitled “Furnished Travel Accommodation Tenancy Agreement”, I find it important to note that the Landlord never engaged in any discussions with the Tenant about this being rented exclusively for vacation or travel accommodation. In fact, there appeared to be no discussion at all with the Tenant about why it was being rented. Moreover, the Tenant was presented with one six-month tenancy agreement and the Landlord did not provide any explanation for why another six-month tenancy was offered. In my mind, had the Landlord truly rented this under the guise of travel or vacation accommodation, she would likely be aware of the Tenant’s situation. In addition, the fact that the two tenancy agreements totalled a rental period of a year would, in my view, be somewhat contrary to this rental unit being for travel or vacation accommodation.

Furthermore, if it was the Landlord’s belief that this truly was rented for travel or vacation accommodation and that the *Act* did not have jurisdiction over this tenancy, it is not clear to me why she made the Application in the first place. While she stated that she made this Application to protect herself, if this unit was sincerely intended to be

rented for travel or vacation accommodation as her agreements specifically indicate, it is unclear to me what she is seeking protection from. Moreover, these tenancy agreements expressly state that “the Residential Tenancy Branch of British Columbia is the inappropriate organization to settle any disputes arising from this agreement.” By making this Application, I find this further contradicts the reliability of the Landlord’s testimony that this was rented for travel or vacation accommodation.

When reviewing the totality of the evidence before me, I find the Landlord’s testimony to be extremely dubious. As she had no discussions with the Tenant over the Tenant’s purpose for rental, and as she made no attempts to convey to the Tenant that this was exclusively for travel or vacation accommodation, I find it more likely that not that the Landlord’s use of these short-term tenancy agreements are her attempts to rent a unit, falsely under the guise of travel or vacation accommodation, and contract outside of the *Act*. This causes me to doubt the Landlord’s credibility on the whole.

As I am not satisfied that the Landlord rented this unit for travel or vacation accommodation, I find that I have jurisdiction under the *Act* to make a Decision with respect to this tenancy.

It should be noted that the Landlord’s demeanour during this hearing appeared to be of great indifference. She was entirely unprepared and unable to answer many basic questions regarding the tenancy. Alternatively, if she was prepared, then it was clear that she had limited or any involvement with this tenancy altogether. As she could not answer many questions with respect to her claims, she was permitted to go to different areas of her office to attempt to retrieve any relevant information or answers that may assist her in supporting her claims. However, this wasted a considerable amount of time as the parties had to wait for the Landlord to leave the hearing and return numerous times.

In addition, as she could not provide any answers with respect to the move-out inspection report, B.H. was brought in multiple times to speak of this issue. During the entire hearing, the Landlord appeared to be on speaker phone and after she was asked to answer details about her claim for damages of rental loss, a male voice was heard in the background instructing her. When she was questioned who this person was, she stated that this person was just walking by. However, it was distinctly audible that this person was providing specific details about the very issues that were being discussed at that moment. Her statement that this person was simply walking by appeared to me to

be wholly untruthful. She was cautioned that this was a legal proceeding and that all participants were to be introduced and solemnly affirmed at the start of the hearing.

She was also advised that if she wanted to have another party attend or participate, that it would not be a problem; however, she would have to introduce them and make the appropriate request. The reason for this is that it is not fair for the Tenant to have unknown parties participating in the hearing without her knowledge. The Landlord apologized, advised that she did not want to have any other parties introduced into the hearing, and that she would take herself off speaker phone.

I note this as throughout the hearing, the Landlord's ambivalent demeanour or lack of knowledge of any details of the tenancy caused me to question the legitimacy of her claims. Furthermore, the obvious deception of another party being in the background participating in the hearing, in addition to the doubts her testimony created with respect to the rental unit being rented for travel or vacation accommodation, further caused me to question the credibility, reliability, and truthfulness of her testimony.

Section 23 of the *Act* states that the Landlord and Tenant must inspect the condition of the rental unit together on the day the Tenant is entitled to possession of the rental unit or on another mutually agreed day.

Section 35 of the *Act* states that the Landlord and Tenant must inspect the condition of the rental unit together before a new tenant begins to occupy the rental unit, after the day the Tenant ceases to occupy the rental unit, or on another mutually agreed day. As well, the Landlord must offer at least two opportunities for the Tenant to attend the move-out inspection report.

Section 18 of the *Residential Tenancy Regulations* (the "*Regulations*") outlines that the move-out inspection report must be given to the Tenant within 15 days after the later of the date the condition inspection is completed, and the date the Landlord receives the Tenant's forwarding address in writing.

Section 36(2)(c) of the *Act* states that the right of the Landlord to claim against a security deposit for damage is extinguished if the Landlord does not give the Tenant a copy of the move-out inspection report in accordance with the *Regulations*.

Section 38 of the *Act* outlines how the Landlord must deal with the security deposit at the end of the tenancy.

With respect to the Landlord's claim against the Tenant's security deposit, Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenant's forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenant, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlord received the Tenant's forwarding address in writing on the move-out inspection report on April 30, 2020. Furthermore, the Landlord made an Application to attempt to claim against the deposit on May 15, 2020. While the Landlord made this Application within 15 days of receiving the Tenant's forwarding address in writing, I am not satisfied that the Landlord complied with Section 18 of the *Regulations* by providing the Tenant with a copy of the move-out inspection report within 15 days of April 30, 2020.

I do not find that the Landlord's statement that B.H. "should have given a copy to the Tenant" to be reliable in confirming that the Tenant was actually given a copy of the move-out inspection report. Furthermore, she confirmed that she provided a copy to the Tenant in September 2020; however, this was well after the 15 days. In addition, B.H. confirmed that the reason he never gave the Tenant a copy of this report is because she never asked for one and that his typical course of action is advising any outgoing tenants to take a picture of the move-out inspection report.

Based on this testimony, I find that asking the Tenant to take a picture of this report does not satisfy the requirements of the Landlord having to provide the Tenant with a copy. Furthermore, in my view, it is clearly evident that the Tenant was not provided with a copy of the move-out inspection report in accordance with the *Regulations*. As a result, I am satisfied that the Landlord extinguished her right to claim against the deposit. As the Landlord claimed against the deposit instead of returning it within 15 days, I find that she breached the requirements of Section 38. As such, I find that the doubling provisions of the *Act* do apply in this instance.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or

loss", and that "the value of the damage or loss is established by the evidence provided."

Regarding the Landlord's request for liquidated damages, I find it important to note that Policy Guideline # 4 states that 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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

When reviewing the totality of the evidence before me, there is no dispute that the parties entered into a new fixed term tenancy agreement for six months starting on April 1, 2020 and ending on October 31, 2020. While the Landlord noted that section F.7. of the addendum to her tenancy agreement allows for liquidated damages to be claimed, I find it important to note that it specifically states that, "Administration, liquidated damages and related charges may be applicable if the Tenant terminates this lease prior to the lease end date indicated on the lease." Furthermore, there is no specific amount noted on this addendum for how much the liquidated damages cost would be.

As this addendum only indicates that liquidated damages "may be applicable" and as there is no set amount, I am not satisfied that the parties have agreed in advance to this being applicable, nor am I satisfied that the parties agreed in advance to a specific amount. Furthermore, I do not find that the Landlord's basis for determining the cost of liquidated damages to be acceptable. As the amount she is claiming is contingent on being half of the next tenant's rent, it is not possible for her to have known this amount at the start of the Tenant's tenancy. Therefore, the requirement of the liquidated damages amount being a "genuine pre-estimate of the loss at the time the contract is entered into" could not have been satisfied. Consequently, I dismiss the Landlord's claim for liquidated damages in its entirety.

With respect to the Landlord's claim in the amount of $1,400.00 for rental loss because the Tenant broke the fixed term tenancy early, as noted above, the burden of proof rests with the Landlord to prove her claim. While the consistent and undisputed evidence is that the Tenant ended the fixed term tenancy early, other than the Landlord's testimony that the rental unit was re-rented on May 16, 2020 for a lesser amount, she has provided insufficient evidence to corroborate this. As a result, I dismiss the Landlord's claim for rental loss in its entirety.

Finally, regarding the Landlord's claim in the amount of $105.00 for cleaning of the rental unit, the Landlord's attempts to describe the alleged necessary cleaning was vague and generalized, and it was evident that she did not know any specifics with respect to the condition the rental unit was left in. When assessing B.H.'s submissions with respect to the condition, his testimony was marginally more detailed; however, I do not find it to be entirely reliable as he acknowledged that his memory was not clear and that he could not "remember specifics".

When reviewing the move-out inspection report, I do not find that a notation of "cleaning required" to be an acceptable indicator or assessment of the condition of the rental unit. Furthermore, while B.H. submitted that the handwriting on the move-out inspection report was all his and that the colour of the ink was all the same, I find it important to note that his answers to these questions and to questions about the condition of the rental unit were delayed. As discussions could be heard in the background, it appeared as if he was being guided or instructed to give certain answers.

In addition, even though the move-out inspection report was submitted as documentary evidence in black and white, it does appear to me that there is some difference in the contrast of the ink used, which causes me to doubt the truthfulness of their testimony. Based on the above doubts that I have about the accuracy and legitimacy of the Landlord's testimony, I am doubtful of the validity of the move-out inspection report. Ultimately, I dismiss this claim in its entirety. However, as the Tenant acknowledged to a deduction of $25.00 from her security deposit for cleaning, this will be awarded to the Landlord.

While I have not made a definitive finding that the Landlord has fraudulently made alterations to this report and attempted to portray it as authentic, there have been enough discrepancies and inconsistencies in the Landlord's testimony and presentation during this hearing for me to doubt her credibility and the legitimacy with how she has managed this rental unit.

As the Landlord was not successful in her claims, I do not find that she is entitled to recover the $100.00 filing fee paid for this Application.

Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Tenant a Monetary Order as follows:

Calculation of Monetary Award Payable by the Landlord to the Tenants

Double the security deposit	$2,300.00
Cleaning	-$25.00
TOTAL MONETARY AWARD	**$2,275.00**

Conclusion

The Tenant is provided with a Monetary Order in the amount of **$2,275.00** in the above terms, and the Landlord must be served with **this Order** as soon as possible. Should the Landlord fail to comply with this Order, this 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: September 22, 2020

Residential Tenancy Branch