



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

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

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover its filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed the landlord served the tenants with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on December 4, 2020. Both parties confirmed the tenants served the landlord with their submitted documentary evidence in person on February 16, 2021. Neither party raised any service issues. I accept the undisputed affirmed evidence of both parties and find that both parties have been properly served as per sections 88 and 89 of the Act.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent, for money owed or compensation and recovery of the filing fee?

Is the landlord entitled to retain all or part of the security deposit?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on August 1, 2018 on a fixed term tenancy until July 31, 2021 as per the submitted copy of the signed tenancy agreement dated March 20, 2018. The monthly rent began at \$3,550.00 payable on the 1st day of each month. A \$1,775.00 security deposit was paid. The monthly rent became \$3,650.00 beginning August 1, 2019 and then \$3,800.00 beginning on August 1, 2020.

The tenants stated that the tenancy ended on November 10, 2020.

The landlord seeks a monetary claim of \$3,675.00 which consists of:

\$1,750.00	Unpaid Rent, November 2020
\$1,775.00	Liquidated Damages
\$50.00	\$25.00 NSF/ \$25.00 late Charges, November 2020
\$100.00	Filing Fee

The landlord claims that the tenants failed to pay all of the rent for November 2020 leaving a balance of \$1,750.00. The landlord stated that the tenants made a partial payment of \$1,900.00 after the landlord had incurred a \$25.00 NSF charge from the tenants' pre-authorized deposit. The landlord stated as such the tenants also incurred a \$25.00 late fee for non-payment of rent after the 1st day of the November 2020.

The tenants dispute the landlords claim arguing that a partial payment was made via bank draft of \$1,900.00. The tenants confirmed that \$1,900.00 was paid to the landlord and as part of an agreement made for the landlord to apply the \$1,775.00 security deposit against the remaining portion of the November 2020 rent. The tenants stated that the landlord was notified that they had cancelled the pre-authorized payment for November 2020 rent payment in a letter that was provided to the landlord notifying the landlord on October 30, 2020 requesting the cancellation of the pre-authorized deposit of rent. The landlord stated that this letter was not served to them in a timely manner to allow for the cancellation of the pre-authorize payment to be cancelled.

The landlord disputed that any such agreement was made as a security deposit was held for any damage caused by the tenants during the tenancy. The landlord stated

they have applied as part of this application to offset any claims against the \$1,775.00 security deposit held.

Discussions took place with both parties in which it was agreed that the tenants had only paid \$1,900.00 towards the \$3,675.00 November 2020 rent. Both parties agreed to apply the \$1,775.00 security deposit to the remaining outstanding balance of unpaid rent of \$1,750.00. On this basis, the landlord has been successful for unpaid rent of \$1,775.00 for November 2020. This leaves an outstanding balance of \$25.00 for the security deposit.

The landlord referenced section 3.1 Liquidated Damages for the claim of \$1,775.00 which states in part,

If the Tenant end or gives notice to end tenancy before the end of the original Term of this Lease, or any subsequent fixed term, or if the Tenant is in breach of the Residential Tenancy Act or a material term of this Lease that causes the Landlord to end the tenancy before the end of the original Term or subsequent fixed term ("Early Termination"), then the Tenant must pay the sum of \$1775.00 to the Landlord as liquidated damages and not as a penalty ("Liquidated Damages"). The Liquidated Damages is an agreed pre-estimate of the Landlord's administrative costs of advertising and re-renting the Premises as a result of the Early Termination. Payment of Liquidated Damages does not preclude the Landlord from exercising any further right to recovering other damages from the Tenant.

[reproduced as written]

The tenants confirmed that they had signed and acknowledged section 3.1 of the signed tenancy agreement regarding liquidated damages. However, the tenants argued that the tenancy agreement was voided as a mutual agreement to end the tenancy was made. The tenants stated that on October 6, 2020 the tenants were asked by the landlord's agent via email, "Can you do November 1st date?" the landlord was implying that they would like to re-rent the unit earlier than the end of tenancy date agreed to for November 30, 2020. The tenants responded that "While it would create some issues for us, we believe that we could make that happened in order to facilitate getting a lease in place..." The email also stated, "We would appreciate being able to sign off on a mutual termination agreement for that date to conclude our tenancy". The tenants stated that the only response provided was an email on November 8, 2020 from the landlord's agent that stated in part, "Letting you know I sent out a lease for November 15th Occupancy, will let you know once its signed." The tenants stated that they understood this to mean that a mutual agreement to end the tenancy had been made.

The landlord argued that at no time was a mutual agreement to end the tenancy made with the tenant.

The landlord also seeks compensation for the \$25.00 late fee for November 2020 and the \$25.00 NSF charge incurred as a result of the landlord processing the tenant's pre-authorized rent payment for November 2020.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In this case, I accept the affirmed testimony of both parties and find based upon the direct testimony of both parties that both parties have confirmed that only \$1,900.00 was paid directly to the landlord as rent for November 2020. Despite the tenants claiming that an agreement was made to offset the remaining \$1,750.00 owed for November 2020 rent, the landlord did not and has not applied the security deposit to the owed rent. As both parties were now consenting to this issue, I find that the landlord has established that \$1,750.00 was not directly paid to the landlord for rent owed. On this basis, the landlord has been successful in its claim for unpaid rental arrears of \$1,750.00 for November 2020 rent.

I also find as a result of the tenants cancelling the pre-authorized rent payment on October 30, 2020 via letter without prior notification to the landlord that a \$25.00 NSF charge was incurred by the landlord. Subsequent to this the landlord has also established that a \$25.00 late rent fee has been incurred.

On the landlord's claim for liquidated damages of \$1,775.00, I find that the landlord has been successful.

Residential Tenancy Branch Policy Guideline #4, Liquidated Damages, states in part,

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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. In considering whether the sum is a penalty or liquidated damages, an arbitrator will consider the circumstances at the time the contract was entered into.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- *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.*

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 use...

In this case, both parties acknowledged that the tenancy agreement includes a liquidated damages clause as set out in section 3.1. The tenants confirmed that they understood and agreed to this term in the tenancy agreement when it was entered into on March 20, 2018. In this case, the tenants provided their notice to end the tenancy on July 15, 2020 for November 30, 2020. Despite the landlords advising the tenants that they were listing the property for sale, the tenants initiated the notice to end tenancy before the end of the fixed term of July 31, 2021. As such, I find that the landlord has provided sufficient evidence of an entitlement for liquidated damages of \$1,775.00. This finding is made despite the tenants arguments that after notice was given to the landlord that a mutual agreement to end tenancy was entered into. The landlord has disputed that such an agreement took place and the tenants rely on their interpretation of how events took place despite not receiving a direct answer to their inquiries. I find that without further evidence, the tenants have failed to provide sufficient evidence of a

mutual agreement to end the tenancy that would have voided the tenants' notice to end tenancy.

The landlord's monetary claim application for \$3,675.00 is granted, which includes recovery of the filing fee as detailed above. I authorize the landlord to retain the \$1,775.00 security deposit in partial satisfaction of this claim.

Conclusion

The landlord is granted a monetary order for \$1,900.00.

This order must be served upon the tenants. Should the tenants fail to comply with this order, the order may be filed in the Small Claims Division of the Provincial Court of British Columbia 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: March 31, 2021

Residential Tenancy Branch