



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOMES LTD. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDL-S, FFL

Introduction

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

- a monetary order for damage to the rental unit pursuant to section 67;
- authorization to retain all or a portion of the tenant's 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 tenant pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony.

Both parties were advised that the conference call hearing was scheduled for 60 minutes and pursuant to the Rules of Procedure, Rule 6.11 Recordings Prohibited that recording of this call is prohibited.

Both parties confirmed the landlord served the tenant with the notice of hearing package via Canada Post Registered Mail on March 19, 2021. Both parties also confirmed the landlord served the tenant with the submitted documentary evidence via Canada Post Registered Mail on July 28, 2021. The tenant confirmed that she did not pick up the package until August 5, 2021. The tenant mentioned that the landlord's late evidence submission forced her to respond with documentary evidence without knowing what the landlord was submitted. Both parties confirmed the tenant served the landlord with her documentary evidence via email on August 3, 2021. The tenant was asked if she had properly reviewed the landlord's evidence since receiving it. The tenant confirmed that she had and was prepared to go ahead with the hearing. The tenant stated that there is nothing she can think of that would prevent her from properly responding to the landlord's evidence. As such, both parties are deemed sufficiently served with the

notice of hearing package and the submitted documentary evidence under section 71 of the Act. Neither party raised any concerns that would make adjourning the hearing necessary.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for damage 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, 2020 on a fixed term tenancy ending on July 31, 2021 and then thereafter on a month-to-month basis as per the submitted copy of the signed tenancy agreement dated July 14, 2020. The monthly rent was \$1,535.00 payable on the 1st day of each month. A security deposit of \$767.50 was paid on August 26, 2020.

The landlord seeks a monetary claim of \$599.00 which consists of:

\$399.00	Cleaning Costs (Carpet/Unit)
\$100.00	Reduced Liquidated Damages
\$100.00	Filing Fee

The landlord claims that the tenant did not provide a carpet cleaning receipt at the end of the tenancy as per section 24 of the signed tenancy agreement.

The landlord referred to section 24 of the signed tenancy which states in part,

24. Floors. All non-carpeted floors must be kept clean and properly cared for by the tenant. The tenant will, within one month of the commencement of this tenancy, carpet all traffic areas that were previously bare floor, to the landlord's reasonable satisfaction. Any furniture located on bare floor must have protective devices on the base or legs to protect the floor from damage.

[reproduced as written]

Discussions during the hearing clarified that the landlord seeks compensation under section 23 of the signed tenancy agreement. It states in part,

23. Carpets and Window Coverings. The tenant is responsible for periodic cleaning of carpets and window coverings provided by the landlord. while professional cleaning is recommended at all times, if the carpets and window coverings are new or professionally cleaned at the start of the tenancy, the tenant will pay for professional cleaning at the end of the tenancy.

[reproduced as written]

The landlord stated that the carpets were professionally cleaned by the last out-going tenant and has submitted a copy of the carpet cleaning invoice dated June 30, 2020 for the same rental unit. The landlord stated that compensation is being sought as it is based solely that this is a term of the signed tenancy agreement.

The tenant disputes the landlord's claim arguing that the carpets had been replaced by new carpet in August 2020 and that they were left "very clean when I left".

The landlord clarified that she is unable to provide any further details on the condition of the carpet and confirmed that the basis for this claim was that the tenant failed to provide a receipt for a professional carpet cleaning.

The landlord also stated as part of this claim the tenant vacated the rental unit not leaving it satisfactorily clean. The landlord refers to the submitted invoice dated February 28, 2021 for "cleaning of carpet and surfaces" for \$399.00. The landlord stated that besides the carpeting the tenant left the baseboards, toilet, fireplace and door tracks not clean. The landlord referred to an 8 page document submission which consists of a "Summary of Cleaning" details and 9 photographs. The landlord described the level of cleaning as incomplete and was missing the finer details of cleaning in these areas. The photographs show a dirty base of the toilet seat; hair and dust in a door track; dust on the heating register; dust and lint on the floor; dust in the kitchen drawer; dust and dirt in the door tracks in the kitchen; and dust on the baseboards.

The tenant argues that the rental unit was cleaned immaculately 1 week prior to the end of tenancy. The tenant has also submitted 22 photographs of the rental unit, marked as "5C" a 22 page submission of 60 photographs of the entire rental unit at the end of tenancy. A review of these photographs show everything clean.

The tenant has also argued that the monetary claim amounts submitted by the landlord are contrary to the landlord's provided "Cleaning checklist" which details the "*minimum* cost for cleaning". The tenant argues that the minimum cleaning charge is \$90.00 for 3

hours) which the tenant argues based upon the landlord's evidence shows that 3 hours of cleaning would not be required. The tenant argues that the minimum cleaning charge for the carpet cleaning is \$175.00. The tenant argues that these two monetary claim amounts exceed the costs claimed by the landlord of \$399.00 combined for both the unit and carpet cleaning.

The landlord stated that the cost for this cleaning was higher due to the landlord sourcing a cleaner on February 28, 2021 to have the unit cleaned for the new tenant on March 1, 2021.

The landlord seeks \$100.00 for a reduced liquidated damages claim as per section 5 of the signed tenancy agreement that the tenant pre-maturely ended the tenancy before the end of the fixed term.

The landlord referred to section 5 of the signed tenancy agreement which states in part,

5. 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 the fixed term, the tenant will pay to the landlord the sum of \$500 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 future rental revenue losses that will remain unliquidated.

[reproduced as written]

The tenant disputes this claim arguing that the tenant had helped in securing a new tenant. The tenant disputes the landlord's claim of the original \$500.00 genuine pre-estimate of costs associated with re-renting the rental unit.

The landlord was unable to provide any details of the \$500.00 set liquidated damages amount. The landlord stated that she has been working for the landlord for approximately 5 years and this is an amount always used for this clause. The landlord confirmed in her direct testimony that the tenant did assist in re-renting the rental unit.

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 on the landlord's first item of claim, \$399.00 for the cost of cleaning (carpet/unit) has failed. The landlord's primary claim regarding the cost of professional carpet cleaning combined with the unit cleaning for a cost of \$399.00 has not been established. The landlord relies upon section 23 of the signed tenancy agreement in which the landlord relies that the tenant must have the carpets professionally cleaned as a term of the tenancy agreement whether or not the carpets required cleaning. The landlord provided no evidence that the carpets were dirty, only that this is part of the advertisement that the rental unit was professionally carpet cleaned. I find that this is an unconscionable term of the tenancy agreement. Residential Tenancy Branch Policy Guideline #8, Unconscionable and Material Terms states in part,

This guideline deals with unconscionable and material terms in a tenancy agreement.

Unconscionable Terms

Under the *Residential Tenancy Act* and the *Manufactured Home Park Tenancy Act*, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.

Terms that are unconscionable are not enforceable¹. Whether a term is unconscionable depends upon a variety of factors.

A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.

The burden of proving a term is unconscionable is upon the party alleging unconscionability.

I find based on this Guideline that the landlord's requirement to have the tenant professionally clean the carpet to be unnecessary, oppressive and unfair to the tenant. The landlord was unable to provide any evidence that the carpets were dirty requiring cleaning much less for it to be professionally cleaned. The landlord relied solely on this part of the claim that it was a term of the tenancy agreement. As such, I find that section 23 of the signed tenancy agreement to be unconscionable and unenforceable and the carpet cleaning portion of the landlord's claim is dismissed without leave to reapply.

On the remaining portion of the landlord's unit cleaning claim the landlord has provided 8 pages of details and photographs showing dusty baseboards; dirty toilet seat and dusty door tracks. I find that the landlord has failed to provide supporting evidence of any further requirements of cleaning that would equal the requirement for cleaning of surfaces as noted on the invoice. The landlord stated that normal professional carpet cleaning costs were \$175.00. This was contradicted by the tenant for \$90.00 (3 hours) who relied upon the landlord's checklist for cleaning. I find that the level of cleaning required based upon the landlord's evidence would not exceed 3 hours. On this basis, this portion of the landlord's claim for cleaning is dismissed.

On the remaining claim of a \$100.00 liquidated damages claim, I find that the landlord has failed. Despite confirming that a liquidated damages clause was entered into by the tenant, the tenant has disputed the landlord's claim that the \$500.00 listed is a genuine pre-estimate of the liquidated damages.

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.*

...A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss...

In this case, the tenant has disputed that the landlord's sum of \$500.00 is a genuine pre-estimate of the costs for re-renting the rental unit. The landlord's only response was that this has always been the amount on all rental agreements since she has been employed for approximately 5 years. No further details were forthcoming. I find in the absence of the landlord's details concerning the estimate of cost to re-rent the rental unit, the landlord has failed to provide sufficient evidence that the liquidated damage clause is a genuine pre-estimate for the costs for re-renting. This portion of the landlord's claim is dismissed.

The landlord's entire monetary claim has been dismissed without leave to reapply. As the landlord still holds the \$767.50 security deposit, I grant the tenant a monetary order for its return.

Conclusion

The landlord's application is dismissed without leave to reapply.
The tenant is granted a monetary order for \$767.50.

This order must be served upon the landlord. Should the landlord fail to comply with this order, the 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: August 20, 2021