



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDCL-S, MNSD, FFT, FFL

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, to keep all or part of the security deposit, and to recover the fee for filing an Application for Dispute Resolution.

The Tenant filed an Application for Dispute Resolution in which the Tenant applied for the return of the security deposit and to recover the fee for filing an Application for Dispute Resolution.

The Agent for the Landlord stated that on May 18, 2021 the Dispute Resolution Package was sent to the Tenant, via registered mail, to the forwarding address provided for the Tenant. The Tenant acknowledged receiving these documents.

The Tenant stated that on September 16, 2021 the Dispute Resolution Package was sent to the Landlord, via registered mail, at the service address noted on the Application. The Landlord acknowledged receiving these documents.

In May of 2021 and on July 15, 2021 the Landlord submitted evidence to the Residential Tenancy Branch. The Agent for the Landlord stated that all of this evidence was sent to the Tenant, via registered mail, sometime in May of 2021. The Tenant acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

In September of 2021 the Tenant submitted evidence to the Residential Tenancy Branch. The Tenant stated that all of this evidence was sent to the Landlord, via registered mail, on September 18, 2021. The Agent for the Landlord acknowledged receipt of these documents and they were accepted as evidence for these proceedings.

Although all of the evidence submitted was reviewed during this adjudication, it is not necessarily referred to in this decision.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant affirmed that they would speak the truth, the whole truth, and nothing but the truth during these proceedings.

The participants were advised that the Residential Tenancy Branch Rules of Procedure prohibit private recording of these proceedings. Each participant affirmed they would not record any portion of these proceedings.

Issue(s) to be Decided

Is the Landlord entitled to liquidated damages and to compensation for unpaid rent?
Is the Landlord entitled to keep all or part of the security deposit or should it be returned to the Tenant?

Background and Evidence

The Agent for the Landlord and the Tenant agree that:

- the tenancy began on June 15, 2020;
- the parties signed a fixed term tenancy agreement, the fixed term of which ended on June 30, 2021;
- the Tenant agreed to pay monthly rent of \$1,800.00 by the first day of each month;
- the Tenant paid a security deposit of \$900.00;
- on March 02, 2021 the Tenant advised the Landlord, via email, of her intent to vacate the rental unit on May 01, 2021;
- the rental unit was vacated on April 30, 2021; and
- the Landlord has not returned any portion of the security deposit.

The Tenant stated that she provided her forwarding address to the Landlord, via email, on May 01, 2021. The Agent for the Landlord stated that he is not certain when the

Tenant's forwarding address was received, although he acknowledges it was received by email.

Residential Tenancy Branch records show that the Landlord filed this Application for Dispute Resolution on May 09, 2021.

The Landlord is seeking liquidated damages of \$525.00. The parties agree that section 7 of the tenancy agreement is a liquidated damages clause which reads:

Should the Tenant (1) fail to take possession of the rental unit or (2) have abandoned or vacated the premises before the expiry of the tenancy created by this Agreement; there will immediately become payable by the Tenant to the Landlord monies for all costs incurred as liquidated damages and said monies will be invoiced for accordingly. Liquidated damages are charges such as rent lost due to suite vacancy, advertising costs, leasing commissions (\$500.00 + applicable taxes), administrative costs and other reasonable costs incurred. Once all liquidated damages have been incurred, a reconciliation will be done and the excess monies will be refunded or in the event of a shortage on monies, an invoice will be prepared for payment by the tenant.

The Agent for the Landlord stated that the Landlord incurred a leasing commission cost of \$300.00; that ½ of the leasing commission cost is paid to him; the other ½ of the leasing commission cost is paid to "other employees" and that there were approximately \$200.00 in administrative costs associated to processing the move out and the new occupant's tenancy.

The Tenant submits that the Landlord is not entitled to liquidated damages because the Landlord did not incur \$525.00 in costs. She submits that the Landlord did not incur any advertising costs; that the Landlord may have incurred the costs of a credit check, which she estimates to be \$30.00, and the Landlord may have incurred a leasing commission of \$100.00 to \$200.00. She submits that the costs outlined by the Agent for the Landlord in the liquidated damages clause are not reasonable.

The Agent for the Landlord and the Tenant agree that the Landlord did not provide the Tenant with a reconciliation of the liquidated damages that were incurred. Rather, the Landlord simply provided the Tenant with an invoice that declared the Tenant owes a "break lease fee" of \$500.00 and "GST" of \$25.00.

At the hearing the Landlord and the Tenant agreed that the Tenant did not authorize the Landlord, in writing, to retain any portion of the security deposit.

A copy of a condition inspection report was submitted in evidence. The Tenant has signed the area on this report which declares that she agrees to a deduction of \$525.00 from her security deposit. The Tenant stated that she did not have time to review the condition inspection report prior to signing it and she did not intend to agree to the Landlord retaining \$525.00 from her security deposit.

The Tenant stated that she has a witness who can corroborate her testimony that she was not given time to review the final condition inspection report before she signed the area in which she authorized the Landlord to retain a portion of the security deposit.

Upon being advised that my decision on whether the Landlord was entitled to retain \$525.00 from the security deposit in compensation for liquidated damages would not be based on her signature on the condition inspection report, she stated that she did not wish to call the aforementioned witness.

The Tenant submitted an email, dated March 08, 2021, in which she informed the Landlord that she will not be vacating the rental unit and that she intends to remain in the unit "until the end of my lease".

The Tenant submitted an email chain, dated March 15, 2021, in which the Agent for the Landlord informs her that she can remain in the unit.

The Tenant submitted an email, dated March 30, 2021, in which she informs the Landlord that she will be remaining in the rental unit until the end of her "lease date".

The Tenant submitted an email, dated March 31, 2021, in which she informs the Landlord that she will be vacating the rental unit on May 01, 2021.

The Landlord is seeking compensation of \$150.00 for lost revenue for the months of May and June of 2021. This is based on the Landlord's submission that the rental unit was re-rented for \$1,725.00, which is a monthly loss of \$75.00 for those two months. The Landlord submitted a copy of a tenancy agreement, which indicates the new occupant will be paying rent of \$1,725.00.

The Agent for the Landlord stated that:

- he agreed to reduce the rent to \$1,725.00 because he had not found a new tenant by April 27, 2021 and he wanted to secure a new tenant for May of 2021;

- the new tenant contacted him; and
- the new tenant may have been referred to him by the Tenant.

The Agent for the Landlord stated that:

- he began advertising the rental unit on a popular website and his company's website on April 05, 2021; and
- he did not submit evidence of his attempts to advertise the unit.

The Tenant submits that that:

- on March 08, 2021 she checked a popular website and was unable to locate an advertisement for the rental unit;
- she became concerned and placed her own advertisement on that site;
- As of April 18, 2021, no showings for the rental unit had been scheduled;
- On April 19, 2021 she was able to find the Landlord's advertisement for the rental unit on that popular website;
- She was never able to locate an advertisement on the Landlord's website;
- Her inability to locate the Landlord's advertisement may have been due to the manner in which it was posted, as it was not easily searchable;
- She had numerous people respond to the advertisements she placed on two popular websites;
- The individual who subsequently rented the unit responded to an ad the Tenant placed on a popular website;
- She referred that subsequent renter to the Landlord;
- She does not believe the Landlord has advertised the rental unit in a reasonable manner, which contributed to the Landlord's need to reduce the monthly rent in an effort to find a new tenant for May 01, 2021; and
- she is entitled to double the security deposit because "RTA Division 5 states that should the Landlord withhold the Security Deposit for any reason other than damage to the unit, the tenant shall be returned DOUBLE".

Analysis

On the basis of the undisputed testimony, I find that:

- The parties entered into a fixed term tenancy agreement, the fixed term of which ended on June 30, 2021;
- The Tenant agreed to pay \$1,800.00 per month in rent;
- The Tenant paid a \$900.00 security deposit;

- The Tenant gave notice of her intent to vacate the rental unit on May 01, 2021; and
- The rental unit was vacated on April 30, 2021.

Section 45(2) of the *Residential Tenancy Act (Act)* permits a tenant to end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and 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. As the fixed term of the tenancy did not end until June 30, 2021, I find that the Tenant did not have the right to end this tenancy on a date prior to June 30, 2021.

As the Tenant did not have the right to end this tenancy on April 30, 2021, I find that this tenancy did not end pursuant to section 45(2) of the *Act*. I find that this tenancy ended on April 30, 2021, pursuant to section 44(d) of the *Act*, when the tenant vacated the rental unit.

Section 38(1) of the *Act* stipulates that within 15 days after the later of the date the tenancy ends and the date the landlord receives the tenant's forwarding address in writing, the landlord must either repay the security deposit and/or pet damage deposit or file an Application for Dispute Resolution claiming against the deposits. As the tenancy ended on April 30, 2021 and the Landlord filed their Application for Dispute Resolution on May 09, 2021, I find that the Landlord filed their application to retain the security deposit within the timeline established by section 38(1) of the *Act*.

Section 38(6) of the *Act* stipulates that if a landlord does not comply with section 38(1) of the *Act*, the landlord may not make a claim against the security deposit or any pet damage deposit, and must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As the Landlord complied with section 38(1) of the *Act*, the doubling penalty established by section 38(6) of the *Act* does not apply.

I, respectfully, disagree with the Tenant's submission that the Landlord must repay double the security deposit if the Landlord withholds "the Security Deposit for any reason other than damage to the unit". I am unaware of anything in the *Act* that requires the Landlord to pay double the deposit if the Landlord makes a claim for something other than damage to the unit. Rather, the legislation grants a landlord the

right to make a claim against the security deposit for reasons other than damage to the unit, such as unpaid rent or liquidated damages.

Section 38(4)(a) of the *Act* permits a landlord to retain an amount from a security deposit or a pet damage deposit if, at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant.

As the Agent for the Landlord testified that the Landlord did not have permission, in writing, to keep any portion of the security deposit, I find that the Landlord is not attempting to retain any portion of the security deposit pursuant to section 38(4)(a) of the *Act*.

As the Landlord is not attempting to retain any portion of the security deposit pursuant to section 38(4)(a) of the *Act* and the Tenant submits that she did not intentionally provide the Landlord with consent to retain \$525.00 from her security deposit, I have placed no weight on the condition inspection report in which the Tenant signed the area on the report which indicates she agrees the Landlord can retain \$525.00 from her deposit. I will determine whether the Landlord has established the right to retain \$525.00 from the Tenant's security deposit as compensation for liquidated damages, without relying on the signature on the condition inspection report.

Residential Tenancy Branch Policy Guideline #4, with which I concur, defines a liquidated damages clause as "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". As the parties signed a tenancy agreement that has a liquidated damages clause that requires the Tenant to pay liquidated damages of \$500.00 plus tax if the Tenant "abandoned or vacated the premises before the expiry of the tenancy created by this Agreement", I find that the parties agreed in advance that the Tenant would pay \$500.00 plus tax in damages if she ended the tenancy prematurely.

Residential Tenancy Branch Policy Guideline #4 suggests that 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". I find that \$500.00 plus tax is a reasonable estimate given the expense of advertising a rental unit; the time a landlord could reasonably expect to spend showing the rental unit and screening potential tenants; administrative costs of ending and entering into a new tenancy; and the wear and tear that moving causes to

residential property. As the amount agreed to us a reasonable pre-estimate of the costs of re-renting the unit, I find that the liquidated damages clause is enforceable.

Residential Tenancy Branch Policy Guideline #4 also suggests that 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” and “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”. (Emphasis added)

With respect, I disagree with the Tenant’s submission that the Landlord is not entitled to collect liquidated damages because the Landlord did not incur \$500.00 in costs to re-rent the unit. The parties agreed in advance on the amount of damages and the Tenant is now obligated to pay that amount, even if the Landlord was fortunate enough not to incur \$500.00 in costs.

Residential Tenancy Branch Policy Guideline #4 suggests that when determining whether the agreed upon sum is a penalty or liquidated damages, I should consider that the sum is a penalty if the sum is extravagant in comparison to the greatest loss that could follow a breach. As has been previously stated, I find that sum to be a reasonable estimate of the costs of re-renting and I cannot, therefore, find that the clause should be considered a penalty.

Residential Tenancy Branch Policy Guideline #4 suggests that if an agreement is to pay liquidated damages and a failure to pay the agreed upon damages requires that a greater amount be paid, the greater amount should be considered a penalty. This is not the case in these circumstances.

Residential Tenancy Branch Policy Guideline #4 suggests that if a single lump sum is to be paid on occurrence of several events, some trivial and some serious, there is a presumption that the sum is a penalty. In these circumstances the liquidated damages are to be paid only if the Tenant fails “to take possession of the rental unit” or she has “abandoned or vacated the premises before the expiry of the tenancy created by this Agreement”. I find that these are both serious matters and that the clause cannot be considered a penalty on this basis.

After considering the evidence in its entirety, I am satisfied that the liquidated damages clause should not be considered a penalty. Rather, I find that the Tenant agreed, in advance, that she would pay \$500.00 plus tax if she vacated the rental unit prior to the

end of the fixed term of the tenancy. I therefore award \$525.00 in liquidated damages to the Landlord, which includes \$25.00 for GST.

On the basis of the undisputed evidence, I find that the Landlord lost \$150.00 in revenue in May and June of 2021, which the Landlord would not have lost if the tenancy had continued until June 30, 2021. This is based on the undisputed evidence that the unit was re-rented for \$1,725.00 per month, which is \$75.00 less than the Tenant was paying per month. I find the Agent for the Landlord's explanation that he agreed to reduce the rent to \$1,725.00 because he had not found a new tenant by April 27, 2021 and he wanted to secure a new tenant for May of 2021 is reasonable.

In some circumstances a landlord would be entitled to lost revenue if they experienced a loss because a tenant ended a fixed term tenancy on a date that was earlier than the end date specified in the tenancy agreement, which is a breach of section 45(2) of the *Act*.

Section 7(2) of the *Act* stipulates, in part, that a landlord who claims compensation for damage or loss that results from a tenant's non-compliance with the *Act*, the regulations, or their tenancy agreement, must do whatever is reasonable to minimize the damage or loss. When a landlord applies for compensation for lost revenue, the landlord bears the burden of proving that they took reasonable steps to minimize their lost revenue.

I find that the Landlord has submitted insufficient evidence to show that the Landlord took reasonable steps to minimize their lost revenue by advertising the rental unit in a timely manner. In reaching this conclusion I was heavily influenced by the absence of any evidence that corroborates the Agent for the Landlord's testimony that the unit was advertised on April 05, 2021 or that refutes the Tenant's testimony that she could not locate an advertisement for the rental unit until April 19, 2021.

Had the rental unit been advertised on April 01, 2021, I find it entirely possible that the Landlord would have been able to locate a tenant who was willing to pay rent of \$1,800.00, effective May 01, 2021. As the delay in advertising the unit may have contributed to the delay in securing a new tenant and the Agent for the Landlord's subsequent decision to reduce the rent in an effort to security the new tenant, I find that the Landlord Failed to establish that the Landlord properly mitigated the losses experienced as a result of the premature end to the tenancy. I therefore dismiss the Landlord's claim for lost revenue of \$150.00.

As the Landlord has established that the Landlord is entitled to compensation for liquidated damages, I find that the Landlord is entitled to recover the fee for filing an Application for Dispute Resolution.

As the Tenant has established that she has the right to the return of some of her security deposit, I find that she is entitled to recover the fee for filing an Application for Dispute Resolution.

Conclusion

The Landlord has established a monetary claim, in the amount of \$625.00, which includes \$525.00 in liquidated damages and \$100.00 in compensation for the fee paid to file this Application for Dispute Resolution. The Landlord has established a monetary claim, in the amount of \$100.00, in compensation for the fee paid to file this Application for Dispute Resolution.

After offsetting the two monetary claims, I find that the Tenant owes the Landlord \$525.00. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain \$525.00 from the Tenant's security deposit of \$900.00 in full satisfaction of this monetary claim.

As the Landlord has failed to establish a right to retain the entire security deposit, I Order the Landlord to return the remaining \$375.00 of the Tenant's deposit, and I grant the Tenant a monetary Order for \$375.00. In the event the Landlord does not comply with this Order, it may be served on the Landlord, filed with the Province of British Columbia Small Claims 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 *Act*.

Dated: October 19, 2021

Residential Tenancy Branch