Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding TOP VISION REALTY INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes:

MNSDS-DR, MNDCL-S, FFT, FFL

Introduction:

This hearing was convened in response to cross applications.

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

The Landlord filed an Application for Dispute Resolution in which they applied for a monetary Order for money owed, to retain the security deposit, and to recover the fee for filing an Application for Dispute Resolution. The Tenant with the initials "JH" is the only Respondent named in the Landlord's Application for Dispute Resolution.

The Occupant stated that the Tenants' Dispute Resolution Package and evidence the Tenants submitted to the Residential Tenancy Branch on May 12, 2022 was sent to the Landlord, via registered mail, although she cannot recall the date of service. The Agent for the Landlord acknowledged receiving these documents on May 31, 2022, and the evidence was accepted as evidence for these proceedings.

The Agent for the Landlord stated that on June 17, 2022 the Dispute Resolution Package and evidence submitted to the Residential Tenancy Branch on June 03, 2022 was sent to "JH", via registered mail. "JH" acknowledged receiving these documents and the evidence was accepted as evidence for these proceedings.

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.

Preliminary Matter #1

This hearing commenced at the scheduled start time of 1:30 p.m. The Agent for the Landlord joined the teleconference at the scheduled start time. The Tenant and the Occupant joined the teleconference approximately 12 minutes after the commencement of the hearing.

Information and issues that were discussed prior to the Tenant attending the hearing were repeated for the Tenant. Testimony provided by the Agent for the Landlord prior to the Tenant's attendance was summarized for the Tenant and the Tenant was given the opportunity to testify regarding those same issues, which were primarily related to terms of the tenancy agreement.

Preliminary Matter #2

As the Landlord has only named "JH" as a Respondent in the Landlord's Application for Dispute Resolution, any monetary Order granted to the Landlord can only be enforced against "JH".

As will be discussed later in the decision, "JH" is the only party named as a tenant on the written tenancy agreement. Any monetary Order granted to the Tenant will only require the Landlord to pay compensation to "JH".

Issue(s) to be Decided:

Are the Tenants entitled to the return of double the security deposit?
Is the Landlord entitled to retain the security deposit as compensation for liquidated damages?

Background and Evidence:

The Agent for the Landlord and the Tenant agree that:

- “JH” and the Landlord have a fixed term tenancy agreement, the fixed term of which began on July 01, 2021 and ended on June 30, 2022;
- The other parties named on the Tenants’ Application for Dispute Resolution were not named as tenants on the tenancy agreement;
- The Tenant agreed to pay monthly rent of $2,500.00 by the first day of each month;
- Clause 4 of the addendum to the tenancy agreement declares that the Tenant must pay the equivalent of ½ month’s rent if the Tenant “request leaving before the end of the original terms as set out ITEM 2” of the tenancy agreement;
- A security deposit of $1,250.00 was paid;
- The rental unit was vacated on January 25, 2022;
- the Tenant did not authorize the Landlord to retain any portion of the security deposit; and
- the Landlord did not return any portion of the security deposit.

The Occupant stated that the Tenant gave verbal notice to end the tenancy on December 30, 2021, at which time the Landlord was advised the rental unit would be vacated by January 31, 2022. The Agent for the Landlord stated that this verbal notice was provided at the beginning of January of 2022.

The parties agree that the Tenant did not provide written notice of this intent to end the tenancy. The Agent for the Landlord stated that the Landlord accepted the verbal notice and began looking for a new tenant.

The Occupant stated that the Tenant provided a forwarding address to the Landlord, via email, on April 22, 2022. The Agent for the Landlord stated that the Landlord did not receive this email. The Occupant stated that the Tenant did not submit a copy of this email to the Residential Tenancy Branch.

The Agent for the Landlord stated that the Landlord did not receive a service address for the Tenant until the Landlord received the Tenants’ Application for Dispute Resolution on May 31, 2022.

The parties agree that both parties initialed the addendum to the tenancy agreement. The Occupant stated that although they read clause 4 of the addendum, they did not completely understand it.

The Agent for the Landlord stated that when the tenancy began the terms of the addendum to the tenancy agreement were explained to the Tenant by an agent for the

Landlord. The Occupant stated that the terms of the addendum were not explained to the Tenant at the start of the tenancy.

The Agent for the Landlord stated that clause 4 of the addendum was again discussed with the Tenant after the gave verbal notice to end the tenancy prior to the end of the fixed term of the tenancy. The Occupant stated that the clause 4 of the addendum were not explained to the Tenant after they gave notice to end the tenancy.

The Occupant stated that when notice to end tenancy was given to the building manager, the building manager told the Tenant the Tenant's security deposit would be returned if the Tenant found a new person to rent the unit. The Agent for the Landlord stated that he has met with the building manager and was advised that the Tenant was not told the security deposit would be returned if the Tenant found a new person to rent the unit.

The Occupant stated that the Tenant told the building manager that they would be showing the unit to a person known to the Tenant; that they showed the unit to that person; and that person decided to rent the unit. The Occupant stated that the person who viewed the unit was told to contact the Landlord to arrange to rent the unit.

The Agent for the Landlord stated that in mid-January of 2022 the Landlord entered into a tenancy agreement with the person who was known to the Tenant. He stated that the Landlord did not know this person was referred to the Landlord by the Tenant until after the Landlord had entered into a tenancy agreement with that individual.

The Tenant submits that the Tenants should not have to pay liquidated damages because they found a new renter.

The Agent for the Landlord stated that in spite of the referral made by the Tenant, which the Landlord appreciates, the Landlord advertised the rental unit; the Landlord showed the rental unit on two occasions; the Landlord spent time determining the suitability of the person referred by the Tenant; and the Landlord completed move-in/move-out reports.

Analysis:

On the basis of the undisputed evidence, I find that the Landlord entered into a fixed term tenancy agreement with "JH", the fixed term of which began on July 01, 2021 and ended on June 30, 2022.

Although the Respondent with the initials “JL” lived in the rental unit, she is not named on the tenancy agreement. As such, I find that she should be considered an Occupant, rather than a tenant, and she is not entitled to compensation from the Landlord. Any monetary Order granted to the Tenant will not name this party.

The Addendum to the tenancy agreement shows that the Respondent with the initials “RL” is a child who is not named on the tenancy agreement. As such, I find that “RL” is not a tenant and is not entitled to compensation from the Landlord. Any monetary Order granted to the Tenant will not name this party.

On the basis of the undisputed evidence, I find that the Tenant gave verbal notice to end the tenancy, effective January 31, 2022 and that they vacated the rental unit on January 25, 2022. I therefore find that this tenancy ended when the Tenant vacated the rental unit on January 25, 2022, pursuant to section 44(1)(d) of the *Residential Tenancy Act (Act).*

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.

When a tenant is claiming compensation for double the return of the security deposit, the onus is on the Tenant to establish that a forwarding address was provided to the Landlord. I find there is insufficient evidence to establish that the Tenant provided the Landlord with a forwarding address by email on April 22, 2022. In reaching this conclusion I was heavily influenced by the absence of evidence, such as a copy of the email, that corroborates the Occupant’s testimony it was sent or that refutes the Agent for the Landlord’s testimony that it was not received.

On the basis of the testimony of the Agent for the Landlord and a Canada Post document submitted in evidence by the Landlord, I find that the Landlord received a forwarding address for the Tenant on May 31, 2022. On the basis of the testimony of the Agent for the Landlord and in the absence of evidence to the contrary, I find that this is the first time the Landlord received a forwarding address for the Tenant.

Residential Tenancy Branch records show that the Landlord filed their Application for Dispute Resolution on June 03, 2022. As this is less than fifteen days after the

Landlord received the forwarding address for the Tenant, I find that the Landlord complied with section 38(1) of the *Act.*

Section 38(6) of the *Act* stipulates that if a landlord does not comply with subsection 38(1) of the *Act*, the landlord must pay the tenant double the amount of the security deposit, pet damage deposit, or both, as applicable. As I have found that the Landlord complied with section 38(1) of the *Act,* I find that the Tenant is not entitled to compensation pursuant to section 38(6) of the *Act.* I therefore dismiss the application for the return of double the security deposit.

On the basis of the undisputed evidence, I find there is a liquidated damages clause in the addendum to the tenancy agreement that was signed by the Tenant with the initials JH, which requires the Tenant to pay $1,250.00 to the Landlord if the Tenant prematurely end this fixed term tenancy. As the Tenant initialled the addendum to the tenancy agreement and the Occupant acknowledged that they read it, I find that the Tenant is bound by the terms of the addendum.

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.

Residential Tenancy Branch Policy Guideline #4 reads, in part:

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 clause.

The amount of liquidated damages agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into. I find that $1,250.00 these parties agreed to is a reasonable estimate given the expense of advertising a rental unit; the time a landlord must spend showing the rental unit, screening potential tenants, signing contracts, and completing condition inspection reports; and the wear and tear that moving causes to residential property.

While I accept that the Tenant helped the Landlord find a new tenant, the Landlord still incurred costs associated to beginning a new tenancy. Regardless, when the amount of liquidated damages agreed upon is reasonable, a tenant must pay the stipulated sum even where the actual damages are negligible or non-existent.

Generally liquidated damage clauses will only be struck down when they are oppressive to the party having to pay the stipulated sum, which I do not find to be the case in these circumstances. On this basis, I find that the Landlord is entitled to collect liquidated damages of $1,250.00.

In adjudicating this matter, I have placed no weight on the Tenant's submission that the building manager told the Tenant the Tenant's security deposit would be returned if the Tenant found a new person to rent the unit. I have placed no weight on this submission because the Landlord disputes it and the Tenant submitted no evidence to corroborate the Occupant's testimony regarding this conversation. I find it highly unlikely that a building manager would make this offer to a tenant before a tenancy ends, as a security deposit is typically retained until it can be established the rental unit is clean and undamaged at the end of a tenancy.

I find that the Tenant has failed to establish the merit of the Tenant's Application for Dispute Resolution and I dismiss the Tenant's application to recover the fee paid to file the Tenant's Application.

I find that the Landlord's Application for Dispute Resolution has merit and that the Landlord is entitled to recover the fee paid to file this Application.

Conclusion:

The Tenant's Application for Dispute Resolution is dismissed, without leave to reapply.

The Landlord has established a monetary claim of $1,350.00, which includes $1,250.00 in liquidated damages and $100.00 as compensation for the cost of filing this Application for Dispute Resolution. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security deposit of $1,250.00 in partial satisfaction of this monetary claim.

I grant the Landlord a monetary Order for the balance of $100.00 and I am issuing a monetary Order in that amount. In the event the Tenant does not voluntarily comply with this Order, it may be served on the Tenant, 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: September 13, 2022

Residential Tenancy Branch