



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCL-S, FFL

### Introduction

This hearing dealt with the landlord's application, filed on April 27, 2022, pursuant to the *Residential Tenancy Act* ("Act") for:

- a monetary order of \$2,200.00 for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, totalling \$2,200.00 (collectively "deposits"), pursuant to section 38; and
- authorization to recover the \$100.00 filing fee paid for this application, pursuant to section 72.

"Tenant KSC" did not attend this hearing, which lasted approximately 31 minutes from 1:30 p.m. to 2:01 p.m. The landlord's agent and tenant NY ("tenant") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

Both parties confirmed their names and spelling. Both parties provided their email addresses for me to send this decision to both parties after the hearing.

The landlord's agent confirmed the legal name of the landlord company named in this application ("landlord"). He said that he is the property manager for the landlord. He provided the rental unit address. He stated that the landlord is an agent for the owner. He said that he had permission to represent the landlord and owner at this hearing.

The tenant confirmed that he had permission to represent the other tenant named in this application, tenant KSC, at this hearing (collectively "tenants").

Rule 6.11 of the Residential Tenancy Branch (“RTB”) *Rules of Procedure* (“*Rules*”) does not permit recordings of any RTB hearings by any participants. At the outset of this hearing, both parties separately affirmed, under oath, that they would not record this hearing.

I explained the hearing and settlement processes, and the potential outcomes and consequences, to both parties. I informed them that I could not provide legal advice to them or act as their agent or advocate. Both parties had an opportunity to ask questions. Neither party made any adjournment or accommodation requests.

Both parties confirmed that they were ready to proceed with this hearing, they did not want to settle this application, and they wanted me to make a decision. Both parties were given multiple opportunities to settle at the beginning and end of this hearing and declined to do so.

I repeatedly cautioned the landlord’s agent that if I dismissed the landlord’s’ application, the landlord would receive \$0 and the landlord could be required to pay the tenants double the value of the tenants’ deposits, totalling \$4,400.00. The landlord’s agent repeatedly affirmed that the landlord was prepared for the above consequences if that was my decision.

I repeatedly cautioned the tenant that if I granted the landlord’s application, the tenants would be required to pay the landlord \$2,300.00, including the filing fee for this application, the tenants would receive \$0, and the landlord would retain both of the tenants’ deposits, totalling \$2,200.00. The tenant repeatedly affirmed that the tenants were prepared for the above consequences if that was my decision.

The tenant confirmed receipt of the landlord’s application for dispute resolution hearing package. In accordance with section 89 of the *Act*, I find that both tenants were duly served with the landlord’s application.

The tenant confirmed that the tenants did not provide any evidence for this hearing, as the landlord already submitted as evidence, what the tenants would have provided.

### Issues to be Decided

Is the landlord entitled to a monetary order compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain the tenant's deposits?

Is the landlord entitled to recover the filing fee for this application?

### Background and Evidence

While I have turned my mind to the landlord's documentary evidence and the testimony of both parties at this hearing, not all details of the respective submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on November 1, 2021 and ended on March 30, 2022. Monthly rent in the amount of \$2,200.00 was payable on the first day of each month. A security deposit of \$1,100.00 and a pet damage deposit of \$1,100.00 were paid by the tenants and the landlord continues to retain both deposits in full, totalling \$2,200.00. A written tenancy agreement was signed by both parties. Move-in and move-out condition inspection reports were completed for this tenancy. The landlord did not have written permission from the tenants to keep any amounts from their deposits. The landlord's application to retain the tenants' deposits was filed on April 27, 2022. A written forwarding address was received by the landlord from the tenants on February 28, 2022, by email, and the landlord accepted email service from the tenants.

The landlord's agent confirmed that the landlord seeks a monetary order of \$2,200.00 for liquidated damages, to retain the tenant's deposits of \$2,200.00, and to recover the \$100.00 application filing fee.

The landlord's agent testified regarding the following facts. Section 18 of the tenancy agreement addendum talks about liquidated damages. The landlord's agent read aloud section 18 of the addendum during this hearing. If the tenant ends a fixed term before the end date, then the agreement is treated at an end, and the tenant is required to pay one month rent equivalent for liquidated damages, which does not include the cost of re-rental in addition to other amounts. It is a genuine estimate of the costs for advertising and re-rental. The tenants signed a fixed term tenancy agreement from November 1, 2021 to November 30, 2022. The tenants provided notice to vacate by March 31, 2022. Section 18 of the lease was broken so the tenant owes liquidated damages for breaking the lease.

The tenant testified regarding the following facts. The tenant read aloud the tenants' notice to end tenancy provided to the landlord, during this hearing. The tenants moved out 4 months into their tenancy. There were issues and problems when the tenants moved into the rental unit, since day one. The floors were uneven in the master bathroom and the toilet was cracked and leaked. In the second bathroom, there was a leak upstairs and the tenants complained for weeks before it was fixed. This is a two-bedroom two-bathroom apartment. The tenant had to take time off work to be present when the landlord fixed the above issues. The tenants were charged late fees on rent that was paid ahead of time, even though the landlord said there would be no charges and it was just a "glitch." The charges were eventually taken off by the landlord, after the tenants made a bunch of calls and sent emails. The landlord's building management was nowhere to be found. There was dog feces all over the rental property and the building manager asked the tenant for ideas of how to deal with it. The tenant suggested putting up dog baskets and doggy bags. Other tenants complained too. The landlord finally followed the tenant's suggestion. The tenants' car was hit and scratched in the parking lot, where there are no cameras. Property was stolen from people's patios. The water company gave someone else's private information to the tenants. The tenants are wondering if this was reported to the privacy commissioner. The tenants' car was damaged in the parking lot.

The tenant stated the following facts. There was a shooting outside the rental building. The tenants do not know whether the landlord does background checks on people. There was fighting and drugs at the rental property. The tenants did not see the landlord's security. Tenant KSC had to go to therapy because the shooting occurred right outside the rental unit. The tenants moved into the rental unit in November and moved out in March, in 4 months. The landlord responded very late to the tenants' issues. The tenant had to think about the safety of his family, and it was not worth living at the rental unit. Half of the tenants have complaints against the landlord. The Arbitrator at this hearing, can do a survey of the building as the tenants did not want to ask other witnesses from the rental building to come to this hearing. The tenants are now paying close to the same rent for a one-bedroom and one-bathroom apartment. The tenants want their security and pet damage deposits back from the landlord. The tenant is not a multibillion dollar company like the landlord, who has lawyers. The tenant has credit card debt, works six days a week, and is a "simple guy." The tenants were paying close to \$2,500.00 a month, including utilities, to live at this rental unit.

The landlord's agent stated the following facts in response. This was a large high-density project and a new building. There were issues that were dealt with by the landlord in a timely manner. There were no notices from the tenants that the landlord

breached any material terms and providing reasonable periods for the landlord to rectify them. The tenants wanted to move on and are using this as a reason to not pay liquidated damages to the landlord.

The tenant stated the following facts in response. The tenants provided notice almost everyday, to the landlord, regarding all of the issues that needed to be fixed at the rental unit.

### Analysis

#### Legislation, Rules, and Burden of Proof

At the outset of this hearing, I repeatedly informed the landlord's agent that, as the applicant, the landlord had the burden of proof, on a balance of probabilities, to prove this application. The landlord's agent affirmed his understanding of same during this hearing.

The landlord was provided with an application package from the RTB, including a four-page document entitled "Notice of Dispute Resolution Proceeding" ("NODRP"), when the landlord filed this application.

The NODRP, which contains the phone number and access code to call into this hearing, states the following at the top of page 2:

*The applicant is required to give the Residential Tenancy Branch proof that this notice and copies of all supporting documents were served to the respondent.*

- *It is important to have evidence to support your position with regards to the claim(s) listed on this application. For more information see the Residential Tenancy Branch website on submitting evidence at [www.gov.bc.ca/landlordtenant/submit](http://www.gov.bc.ca/landlordtenant/submit).*
- *Residential Tenancy Branch Rules of Procedure apply to the dispute resolution proceeding. View the Rules of Procedure at [www.gov.bc.ca/landlordtenant/rules](http://www.gov.bc.ca/landlordtenant/rules).*
- *Parties (or agents) must participate in the hearing at the date and time assigned.*
- *The hearing will continue even if one participant or a representative does not attend.*

- *A final and binding decision will be sent to each party no later than 30 days after the hearing has concluded.*

The NODRP states that a legal, binding decision will be made in 30 days and links to the RTB website and the *Rules* are provided in the same document. During this hearing, I informed both parties that I had 30 days after this hearing to issue a written decision.

The landlord received a detailed application package from the RTB, including the NODRP documents, with information about the hearing process, notice to provide evidence to support their application, and links to the RTB website. It is up to the landlord to be aware of the *Act, Regulation, RTB Rules*, and Residential Tenancy Policy Guidelines. It is up to the landlord to provide sufficient evidence of its claims, since it chose to file this application on its own accord.

The following RTB *Rules* state, in part:

*7.4 Evidence must be presented*

*Evidence must be presented by the party who submitted it, or by the party's agent...*

...

*7.17 Presentation of evidence*

*Each party will be given an opportunity to present evidence related to the claim. The arbitrator has the authority to determine the relevance, necessity and appropriateness of evidence...*

*7.18 Order of presentation*

*The applicant will present their case and evidence first unless the arbitrator decides otherwise, or when the respondent bears the onus of proof...*

I find that the landlord's agent did not properly present the landlord's application and evidence, as required by Rule 7.4 of the *RTB Rules of Procedure*, despite having multiple opportunities to do so, during this hearing, as per Rules 7.17 and 7.18 of the *RTB Rules*.

During this hearing, the landlord's agent failed to properly go through the landlord's claims and evidence submitted in support of its application. He mentioned that the landlord submitted documents for this hearing, but he failed to review them in sufficient detail during this hearing. He did not point me to specific documents or page numbers.

The landlord's agent only referenced paragraph 18 of the tenancy agreement addendum during this hearing.

This hearing lasted 31 minutes, so the landlord's agent had ample opportunity to present the landlord's application and respond to the tenant's testimony. I repeatedly asked the landlord if he had any other information or evidence to present, during this hearing.

Pursuant to section 67 of the *Act*, when a party makes a claim for damage or loss, the burden of proof lies with the applicant to establish the claim. To prove a loss, the landlord must satisfy the following four elements on a balance of probabilities:

- 1) Proof that the damage or loss exists;
- 2) Proof that the damage or loss occurred due to the actions or neglect of the tenants in violation of the *Act*, *Regulation* or tenancy agreement;
- 3) Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
- 4) Proof that the landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

On a balance of probabilities and for the reasons stated below, I make the following findings based on the testimony of both parties at this hearing and the landlord's evidence submitted for this hearing.

### Liquidated Damages

I find that the landlord and tenants entered into a fixed term tenancy for the period from November 1, 2021 to November 30, 2022. Both parties signed the written tenancy agreement, and a copy was provided for this hearing. The above facts were undisputed at this hearing.

Subsection 45(2) of the *Act* sets out how tenants may end a fixed term tenancy:

*A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that*

*(a) is not earlier than one month after the date the landlord receives the notice,*

*(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and*

*(c) 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.*

The above provision states that tenants cannot give notice to end the tenancy before the end of the fixed term. If they do, they may have to pay for monetary losses to the landlord. I find that the tenants breached the fixed term tenancy agreement. As such, the landlord may be entitled to compensation for losses it incurred as a result of the tenant's failure to comply with the terms of the tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that tenants who do not comply with the *Act*, *Regulation* or tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenants' non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

On a balance of probabilities and for the reasons stated below, I dismiss the landlord's application for liquidated damages of \$2,200.00, without leave to reapply.

Residential Tenancy Policy Guideline 4 provides information regarding 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.

I find that the cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants, numerous times.

The landlord's agent read aloud section 18 of the tenancy agreement addendum during this hearing. This provision states, in part, that the liquidated damages amount of one month's rent, is a "genuine and reasonable pre-estimate of the Landlord's administrative costs of advertising and re-renting the Rental Unit as a result of the Early Termination."

However, the landlord did not provide sufficient documentary or testimonial evidence regarding if or when the rental unit was re-rented to new tenants, or the landlord's costs of advertisement or re-rental, as noted above.

I find that the landlord failed to provide sufficient documentary or testimonial evidence including copies of rent advertisements, to show if, when, or how the rental unit was advertised for re-rental, the rent amount per month, the term or length of the tenancy, how long the unit was advertised for, what details were given in the advertisement, and other such information. I find that the landlord failed to provide sufficient documentary or testimonial evidence to indicate if or how many inquiries were made for re-rental, if or how many showings were done, when any showings were done, if or how many applications were received, how many applications were accepted or rejected, and other such information.

The landlord's agent did not testify at this hearing, about how the \$2,200.00 amount for liquidated damages was a genuine pre-estimate of the loss. I find that stating this information in section 18 of the tenancy agreement addendum and reading it aloud during this hearing, without any supporting evidence or information, is not sufficient.

Although the tenants vacated the rental unit prior to the end of the fixed term on November 30, 2022, I find that the landlord did not show how the \$2,200.00 claimed for liquidated damages was a genuine pre-estimate of the loss.

For the above reasons, I dismiss the landlord's application of \$2,200.00 for liquidated damages without leave to reapply.

As the landlord was unsuccessful in this application, I find that it is not entitled to recover the \$100.00 filing fee from the tenants.

### *Tenants' Deposits*

The landlord continues to hold the tenants' entire security deposit of \$1,100.00 and entire pet damage deposit of \$1,100.00, totalling \$2,200.00.

During this hearing, I informed both parties that I was required to make a decision as to whether the tenants were entitled to the return of double the amount of their deposits, as per Residential Tenancy Policy Guideline 17, since the landlord applied to retain the tenants' deposits, in this application. Both parties affirmed their understanding of same. The tenants did not specifically waive their right to the return of double the value of their deposits, as per Residential Tenancy Policy Guideline 17, so I am required to consider it in this decision.

Section 38 of the *Act* requires the landlord to either return the tenants' deposits or file for dispute resolution for authorization to retain the deposits, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the deposits. However, this provision does not apply if the landlord has obtained the tenants' written authorization to retain all or a portion of the deposits to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenants to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

A pet damage deposit can only be used for damage caused by a pet to the residential property. Section 38(7) of the *Act* states that unless tenants agree otherwise, a landlord is only entitled to use a pet damage deposit for pet damage. The landlord applied for liquidated damages in this application, which I find is not pet damage.

I make the following findings on a balance of probabilities and based on the testimony of both parties. This tenancy ended on March 30, 2022. The landlord did not have written permission to retain any amount from the tenants' deposits. The tenants provided a forwarding address by email, which was received by the landlord on February 28, 2022. Email is permitted by section 88 of the *Act* and section 43 of the *Regulation*. The landlord's agent testified at this hearing, that the landlord accepted email service of the forwarding address from the tenants.

The landlord did not return the tenants' deposits or any portions thereof, to the tenants. The landlord filed this application to retain the tenants' deposits on April 27, 2022, which is more than 15 days after the forwarding address was received by the landlord on February 28, 2022, and more than 15 days after this tenancy ended on March 30, 2022.

Interest is payable on the tenants' deposits, totalling \$2,200.00, during the period of this tenancy. No interest is payable for the years 2021 or 2022. Interest of 1.95% is payable for the year 2023. Interest is payable from January 1 to 10, 2023, since the date of this hearing and decision is January 10, 2023. This results in \$1.18 interest on \$2,200.00 for 2.74% of the year based on the RTB online deposit interest calculator. Interest is calculated based on the original amounts of the deposits, totalling \$2,200.00, and is not doubled, as per Residential Tenancy Policy Guideline 17.

In accordance with section 38(6)(b) of the *Act* and Residential Tenancy Policy Guideline 17, I find that the tenants are entitled to receive double the value of their security and

pet damage deposits of \$2,200.00, totalling \$4,400.00, plus \$1.18 in interest. The tenants are provided with a monetary order for \$4,401.18.

### Conclusion

The landlord's entire application is dismissed without leave to reapply.

I issue a monetary order in the tenants' favour in the amount of \$4,401.18 against the landlord. 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: January 10, 2023

---

Residential Tenancy Branch