



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDCL-S, FFL**
 MNSDB-DR, FFT

Introduction

This hearing dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*;
- An order requiring the tenant to reimburse the landlord for the filing fee pursuant to section 72.

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for the landlord to return the security deposit pursuant to section 38;

- An order requiring the landlord to reimburse the tenant for the filing fee pursuant to section 72.

The tenants attended ("the tenant"). The landlord attended with the agent and witness MS ("the landlord").

Both parties had opportunity to provide affirmed testimony, present evidence and make submissions. The hearing process was explained.

Both parties confirmed they were not recording the hearing.

Both parties provided their email addresses to which the Decision will be sent.

Preliminary Issue - Service

The tenant objected to the admissibility of the landlord's evidence as they had not been served in compliance with the Act.

Accordingly, the landlord provided testimony regarding service.

The landlord testified they sent the Notice of Hearing and a complete evidence package by email to the tenant on June 30, 2022. The tenant acknowledged receipt of the email but was not confident all documents relied upon by the landlord were provided.

The landlord stated that email was a primary means of communication between the parties. The tenant acknowledged communication by email and stated the parties also communicated by other means.

Email is not an accepted method of service under section 89.

I set over my Decision regarding service. I instructed the tenant to tell me if the landlord referred to any document they did not have. The tenant did not so advise.

Section 71(1) of the *Act* authorizes the RTB Director to make any of the following orders:

- (a) that a document must be served in a manner the director considers necessary, despite sections 88 [*how to give or serve documents generally*] and 89 [*special rules for certain documents*];
- (b) that a document has been sufficiently served for the purposes of this *Act* on a date the director specifies;
- (c) that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this *Act*.

In consideration of the evidence, I find the landlord sufficiently served the tenant pursuant to section 71(1) (c). I find the landlord sent to the tenant all their evidence by email, the tenant acknowledged receipt of the email, and the tenant did not object during the hearing to any of the landlord's evidence as not being received.

Issue(s) to be Decided

Is the landlord entitled to a Monetary Order?

Is the tenant entitled to return of the deposits?

Is party entitled to reimbursement of the filing fee?

Background and Evidence

The landlord brought an application for an award for liquidated damages and compensation for an agent's fees for locating a suitable replacement tenant. The landlord claimed entitlement to these fees because the tenant vacated a fixed term rental agreement early. The landlord sought authorization to apply the security deposit to the award.

The tenant denied the landlord is entitled to liquidated damages or any award and requested reimbursement of the security deposit and pet deposit (“the security deposit”).

Tenancy Background

A copy of the tenancy agreement was submitted. The parties agreed as follows:

INFORMATION	DETAILS
Type of Tenancy	Fixed term
Beginning Date	November 1, 2021
Fixed Term End Date	October 31, 2022, then month-to-month
Vacancy Date	May 31, 2022
Rent payable on first of month	\$2,200.00
Security deposit	\$1,100.00
Pet deposit	\$1,100.00 (“the security deposit”)
Condition Inspection Report on Move-In signed by both and submitted	yes
Condition Inspection Report on Move-out signed by both and submitted	yes
Forwarding address provided in writing	May 31 and June 22, 2022
Arrears of Rent	None
Landlord application filed	June 14, 2022
Tenant application filed	June 24, 2022

The parties agreed the tenant provided written notice to the landlord on April 8, 2022, that due to unforeseen circumstances, they were moving out on May 1, 2022.

The parties agreed the landlord holds the security deposit in the total amount of \$2,200.00. (This is the total of the two deposits).

The landlord retained the security deposit without the tenant's authorization.

Landlord's claim

The landlord's claim is summarized as follows:

ITEM	AMOUNT
Filing fee	\$100.00
Liquidated damages and compensation for the agent's replacement tenancy fee	\$1,207.50
TOTAL	\$1,307.50

Liquidated Damages and Claim for Compensation

The landlord testified as follows.

The Addendum of the lease states:

23. Your lease is for a FIXED term. Should you terminate, early liquidated damages must be paid by certified funds.

The amount of the liquidated damages is not specified.

The tenant vacated the unit before the end of the fixed term. As a result, the landlord incurred a fee to a placement agency in the amount of \$1,207.50 and submitted a supporting copy of the invoice. The agent who submitted the invoice attended the hearing and provided affirmed testimony supporting the charge to the landlord.

The landlord acknowledged informing the tenant by email that the “security deposit” would be returned. However, the landlord explained he intended to return one half the deposits, and not the entire amount.

The agent acknowledged an error in the amount of the invoice and the landlord acknowledged an error in informing the tenant of the amount of the claim for compensation. The invoice was inadvertently for \$2,400.00 and not the correct final amount of \$1,207.50, being half of the rent of the incoming occupants plus GST. The agent testified this is the industry standard fee.

The agent testified as to the costs associated with renting a unit, such as correspondence, showings, and other administrative expenses.

The landlord did not claim loss of rent. The unit was rented to new tenants on June 1, 2022.

The landlord claimed compensation for the agent’s fees in the amount of \$1,207.50 plus the filing fee for a total claim of **\$1,307.50**.

Condition Inspection Report

The parties agreed a condition inspection took place at the beginning and at the end of the tenancy and a copy of the report was submitted. The landlord does not claim compensation for any damages.

Tenant’s Response

The tenant objected to any charge for liquidated damages as the amount was not agreed between the parties at the time they entered into the agreement. They do not believe the tenant and the agent that the agent earned any fee. Alternatively, the fee is arbitrary.

The tenant testified as follows. The landlord did not incur any compensable expense for a replacement fee as claimed. The tenant testified the unit was

shown to prospective renters 3 times before they moved out. While an agent did attend the showings, the tenant provided a tour of the unit, parking, and building thereby doing most of the work themselves. They voluntarily changed travel plans to pay rent for the month of May 2022 to accommodate a new occupant on June 1, 2023.

Further, the agent submitted two different invoices before the final invoice. The tenant stated that a reasonable conclusion from the landlord's and agent's conduct is that the fee was arbitrary, contrived and artificial. The tenant requested a return of their security deposit.

The tenant did not agree to any deduction from the security deposit at the time of the condition inspection on moving out although the landlord must have known the agent's fee by that time. The tenant asserted that at the time of move out on May 31, 2022, the agent MS informed the tenant the security deposit in its entirety would be returned to them shortly.

On June 8, 2022, the tenant was informed by the agent MS that MS had submitted an invoice for the placement fee that was to be deducted from the security deposit. This was the first information conveyed to them that there would be a charge.

They expressed confusion and bewilderment over the inexplicable, unexpected charge and asked for the return of the total amount of their security deposit of \$2,200.00.

Analysis

I have considered all the submissions and evidence presented to me, including those provided in writing and orally. I will only refer to certain aspects of the submissions and evidence in my findings.

Standard of Proof

Rule 6.6 of the Residential Tenancy Branch Rules of Procedures state that the standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed. The onus to prove their case is on the person making the claim.

It is up to the party to establish their claims on a balance of probabilities.

Burden of Proof – 4-Part Test

When an applicant seeks compensation under the Act, they must prove on a balance of probabilities all four of the following criteria before compensation may be awarded:

1. Has the other party failed to comply with the Act, regulations, or the tenancy agreement?
2. If yes, did the loss or damage result from the non-compliance?
3. Has the claiming party proven the amount or value of their damage or loss?
4. Has the claiming party done whatever is reasonable to minimize the damage or loss?

Where the claiming party has not met each of the four elements, the burden of proof has not been met and the claim fails.

In this case, the onus is on the landlord to prove the landlord is entitled a claim for a monetary award. Similarly, the onus is on the tenant to prove entitlement to the return of the security deposit.

The above-noted criteria are based on sections 7 and 67 of the Act. Section 7(1) of the Act provided that if a landlord or tenant does not comply with the Act, regulation or tenancy agreement, the non-complying party must compensate the other for damage or loss that results. Section 67 of the *Act* allows me to issue a

monetary award for loss resulting from a party violating the Act, regulations or a tenancy agreement.

These sections state as following (emphasis added):

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

. . .

67. Without limiting the general authority in section 62 (3) [. . .] if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Each part of the test is considered.

1. *Did tenant fail to comply with Act, regulations, or tenancy agreement?*

Both parties agreed as follows. In this dispute, the tenancy was a fixed term tenancy. The tenant ended the tenancy on a date that was earlier than the date specified in the tenancy agreement.

Section 44(1) of the Act lists fourteen categories under which a tenancy may be ended, and references section 45 of the Act. Section 45 of the Act deals with a tenant's notice to end a tenancy, and reads, in its entirety, as follows:

(2) 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.

As acknowledged by the parties, the tenant breached a fixed term tenancy.

Therefore, the landlord has met burden of proof under part 1 of the 4-part test.

2. Has the damage or loss resulted directly from a violation – by the tenant – of the Act, regulations, or tenancy agreement?

I find the landlord has met the burden of proof under this aspect of the 4-part test. That is, I find the landlord incurred the expense of the agent's fees to find a replacement tenant in the amount claimed of \$1,207.50.

I accept the landlord's and agent's testimony that the agent properly submitted the invoice to the landlord who incurred the expense because the tenant breached a fixed term tenancy. I accept the agent incurred the time and expenses reflected in the invoice as described in evidence.

3. Has the landlord established the actual monetary amount or value of the damage or loss?

I accept the landlord has incurred an expense for finding a new tenant. I accept the invoice from the agent as supporting documentary evidence for the expense.

I find the expense to be a normal business expense in such situations where a tenant ends a fixed term tenancy early.

I find the landlord has met the burden of proof under this part of the 4-part test.

4. *Has the landlord done what is reasonable to mitigate or minimize the amount of the loss or damage claimed, pursuant to section 7(2) of the Act?*

In considering the parties' testimony, I find the landlord and agent did what was reasonable to mitigate or minimize the amount of the loss or damage.

The unit was re-rented quickly so the landlord did not incur a loss of rent when the tenant breached the fixed term tenancy.

I also acknowledged the tenant was cooperative and helpful in all respects in finding a new tenant.

Summary – Landlord's Claim

I find the landlord's claim for damage or compensation under the Act succeeds. I find the landlord has met the burden of proof with respect to this claim.

I find the landlord cannot categorize this claim as liquidated damages as the amount was not established between the parties at the time the tenancy agreement was filed.

Nevertheless, the landlord has met the burden of proof with respect to their claim for compensation for the agent's expense.

Accordingly, I award the landlord compensation for the agent's fee as well as reimbursement of the filing fee for a total award of **\$1,307.50**.

Tenant's Claim

Section 38 of the Act requires the landlord to either return the security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding

address in writing. The tenant provided the forwarding address on May 31, 2022 and the landlord brought this application within 15 days.

In view of the evidence, I find the tenant is entitled to return of the security deposit less the amount awarded to the landlord as follows:

ITEM	AMOUNT
Security Deposit	\$2,200.00
(Less award to landlord)	(\$1,307.50)
TOTAL	\$892.50

I direct the landlord to reimburse the tenant for the balance of the security deposit.

I grant the tenant a Monetary Order in the amount of **\$892.50**.

Conclusion

I grant the tenant a Monetary Order of **\$892.50**. **This Order must be served on the landlord. The Monetary Order may be filed and enforced in the Courts of the Province of BC.**

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 02, 2023

Residential Tenancy Branch