



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding LAKE OKANAGAN RESORT
LTD and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: *MNRL-S MNDCL-S FFL*

Introduction

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

- a monetary order for money owed or 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 deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- an order authorizing the landlord the recovery of the filing fee for this application from the tenant pursuant to section 72.

The landlord testified that he had served the notice of hearing package on the tenant on October 18, 2022, by email. The landlord had authority from the Residential Tenancy Branch to serve hearing documents via email. The tenant acknowledged receipt of these documents, via email. Despite having been served the notice of hearing, the tenant did not attend the hearing. The landlord attended the hearing and was given full opportunity to present evidence and make submissions.

Issues to be decided

Is the landlord entitled to a monetary award for losses arising out of this tenancy?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the landlord entitled to the recovery of the filing fee?

Background and Evidence

I have reviewed all evidence, including the testimony of the landlord, but will refer only to what I find relevant for my decision.

The tenancy started on April 01, 2022, for a fixed term of 12 months with an end date of March 31, 2023. Rent was \$1,750.00 due on the first day of each month. Prior to moving in the tenant paid a security deposit of \$875.00. The landlord filed a copy of the tenancy agreement which contains a clause that states as follows:

35: TERM TENANCIES Residential leases or term tenancies are enforceable and the tenant who ends a term tenancy or lease prematurely shall be held liable for any costs and or liquidated damages associated with replacing the tenancy and any revenue lost because of the early termination.

The tenant initialled this clause and signed the tenancy agreement, on March 09, 2022.

The landlord testified that on September 26, 2022, the tenant provided a notice to end tenancy effective October 31, 2022, by email. The landlord stated that the tenant paid October's rent and moved out on October 31, 2022, without providing the landlord with a forwarding address. The landlord testified that he advertised the availability of the rental unit on various websites but despite his efforts, he did not find a tenant and the rental unit remained vacant for the balance of the fixed term. The landlord filed copies of the advertisements into evidence. Since a tenant was not found the landlord suffered a loss of rental income for 5 months for the period of November 2022 to March 2023.

The landlord is seeking the following:

Loss of Rental Income (November 2022 to March 2023)	\$8,750.00
Liquidated Damages	\$875.00
Filing Fee	\$100.00
Total	\$9,725.00

Analysis

The principal aspects of the landlord's claims and my findings around each are set out below.

Loss of rental income (November 2022 to March 2023) - \$8,750.00

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

(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.

The above provision states that the tenant cannot give notice to end the tenancy before the end of the fixed term. If the tenant does, he could be liable for a loss of rent during the period when the unit cannot be re-rented. In this case, the tenant vacated the rental unit on October 31, 2022, before the completion of the fixed term on March 31, 2023.

By ending the tenancy prior to the end date of the fixed term, the tenant breached the agreement and therefore the landlord is entitled to damages in an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement.

As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenancy could legally have ended the tenancy. In all cases, the landlord's claim is subject to the statutory duty to mitigate the loss by making attempts to re-rent the unit.

Section 7 of the *Residential Tenancy Act* addresses liability for not complying with this Act or a tenancy agreement and provides as follows:

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.

Section 7(1) of the Act establishes that a tenant who does not comply with the Act, the Regulation or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply.

However, Section 7(2) of the *Residential Tenancy Act*, states that a landlord who claims compensation for loss that results from the tenant's noncompliance with the tenancy agreement and the *Act* must do whatever is reasonable to minimize the loss.

On the basis of the undisputed evidence presented by the landlord, I accept that the landlord made reasonable attempts, to re-rent the premises, in a timely manner by advertising the availability of the rental unit on multiple rental websites. As such, I am satisfied that the landlord discharged his duty under section 7(2) of the Act to minimize his losses.

I further find that despite his efforts to find a replacement tenant, the landlord was unsuccessful and accordingly incurred a loss of income for the period between November 01, 2022, and March 31, 2023.

The landlord seeks five months of rental loss for the period of November 2022 to March 2023, during which the property could not be re-rented. The liquidated damages clause of the tenancy agreement addendum states that the landlord is not precluded from claiming a loss of rental income if liquidated damages are paid by the tenant.

Accordingly, I find that the landlord is entitled to \$8,750.00 for a loss of rent that the landlord incurred for those 5 months of vacancy which resulted from the tenant vacating the unit prior to the end of the fixed term of the tenancy.

Liquidated Damages - \$875.00

Pursuant to section 4 of the *Residential Tenancy Policy Guideline*, 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 this case, a term of the tenancy agreement states that if the tenant ends the tenancy prior to the end date of the fixed term tenancy, the tenant will pay liquidated damages of \$875.00 which represents the cost of re-renting the unit. The tenant will also pay any other amounts owed for rent or damages.

By signing the tenancy agreement and initialing the Liquidated Damages clause, I find that the tenant accepted that he would have to pay liquidated damages in the event he ended the tenancy prior to the end of the fixed term.

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 \$875.00 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, and completing the associated paperwork.

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 the liquidated damages claim of \$875.00.

Filing fee - \$100.00

The landlord has proven his case and is therefore entitled to the recovery of the filing fee.

Overall, the landlord has established a claim for \$9,725.00 which includes \$8,750.00 for lost revenue, \$875.00 for liquidated damages, and \$100.00 for the filing fee.

I order that the landlord retain the security deposit of \$875.00 plus interest of \$8.39 in partial satisfaction of the claim and I grant the landlord an order under section 67 of the *Residential Tenancy Act* for the balance due of \$8,841.61. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the landlord a monetary order in the amount of **\$8,841.61**.

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: June 27, 2023

Residential Tenancy Branch