

DECISION

Introduction

This hearing dealt with the Landlord's Application for Dispute Resolution under the *Residential Tenancy Act* (the "Act") for:

- a Monetary Order for unpaid rent under section 67 of the Act
- a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under 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 under section 38 of the Act
- authorization to recover the filing fee for this application from the Tenant under section 72 of the Act

The hearing also dealt with the Tenants' Application for Dispute Resolution under the Act for:

- a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the Act
- an order under section 62 of the Act that the Landlord comply with the Act, regulation or tenancy agreement
- authorization to recover the filing fee for this application from the Landlord under section 72 of the Act

CT and JK attended the hearing for the Landlord.

Tenants PLM and CM, together with their advocate NM also attended the hearing.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

I find that the Tenants are deemed served on November 13th, 2023, by registered mail in accordance with section 89(1) of the Act, the fifth day after the registered mailing. The Landlord provided a copy of the Canada Post Customer Receipt containing the tracking number to confirm this service.

I find that the Landlord is deemed served on December 13th, 2023, by registered mail in accordance with section 89(1) of the Act, the fifth day after the registered mailing. The Tenants provided a copy of the Canada Post Customer Receipt containing the tracking number to confirm this service.

Preliminary Matters

At the outset of the hearing, the Landlord's agents identified the legal name of the Landlord. The Tenants consented to the amendment of the application to correct the Landlord's name, and the application has been so amended.

Issues to be Decided

Is the Landlord entitled to a Monetary Order for unpaid rent?

Is the Landlord entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

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

Are the Tenants entitled to the return of their security deposit?

Is either party entitled to recover the filing fee for this application from the other?

Background and Evidence

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

Evidence was provided showing that this tenancy began on July 15, 2023 for a fixed term ending June 30th, 2024, with a monthly rent of \$1,850.00, due on first day of the month, with a security deposit in the amount of \$925.00.

CT testified that the Tenants raised the problem of silverfish with the Landlord early in the tenancy, and that the Landlord took action to deal with the silverfish, acting promptly to bring in an pest control professional and providing the Tenants with diatomaceous earth to further address the problem.

However, the Tenants ended the tenancy early on October 31st, 2023. CT testified that they were unable to re-rent the unit for November 2023.

CT testified that there had been no reports of silverfish from the previous tenant in the unit.

JK testified that they had not received complaints of silverfish from the new tenants in the unit.

CM testified that he had been shocked by the volume of silverfish in the rental unit. He estimated that he saw hundreds of silverfish during the course of the tenancy.

CM testified that he gave notice through a notice to vacate provided to the Landlord on September 27th, 2023.

CT testified that, after the Tenants gave notice, they advertised the rental unit on multiple platforms, but not Used Victoria or Facebook Marketplace. He testified that they showed the apartment a number of times but were unable to secure tenants before December.

CT testified that some of the different sites the Landlord uses to advertise rental units require fees and some involve payments for each lead generated. In addition, CT testified that rerenting a unit requires the time of staff, all of whom are paid salaries by the Landlord. He testified that \$500.00 is the industry standard for liquidated damages for early ends to tenancies.

Analysis

Is the Landlord entitled to a Monetary Order for unpaid rent?

Section 26 of the Act states that a tenant must pay rent to the landlord, regardless of whether the landlord complies with the Act, regulations or tenancy agreement, unless the tenant has a right to deduct all or a portion of rent under the Act.

Even though the tenancy agreement was for a fixed term, after the tenancy ended on October 31st, the Tenants were not required to pay rent, but rather are liable for damages under the Act and for breach of the tenancy agreement. I therefore consider the Landlord's claim for November rent under the next heading.

Therefore, the Landlord's application for a Monetary Order unpaid rent is dismissed, without leave to reapply.

Is the Landlord entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

To be awarded compensation for a breach of the Act, the landlord must prove:

- the tenant has failed to comply with the Act, regulation or tenancy agreement
- loss or damage has resulted from this failure to comply
- the amount of or value of the damage or loss
- the landlord acted reasonably to minimize that damage or loss

Based on the evidence before me, the testimony of the parties, and on a balance of probabilities, I find that the Landlord has established a claim for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement.

The Tenants left the fixed term tenancy early, and the Landlord has demonstrated loss of rent for November 2023 in the amount of \$1,850.00. The Landlord related prompt efforts to rerent the unit. While the Tenants have criticized the Landlord's efforts to

rerent the unit as inadequate – primarily in relation to their failure to advertise on two major platforms, a Landlord is not required to pursue every avenue to rerent a rental unit. The business decisions of the Landlord I find to be reasonable. I therefore find that the Landlord has mitigated its damages.

The Tenants, however, ask me to find that the tenancy agreement is void for a material misrepresentation. However, I cannot find that the Landlord knew of a silverfish infestation at the time they rented the unit to the Tenants: the Landlord denies the previous tenant complained of such an infestation, and I am unable to infer that the Landlord knew of such an infestation.

The Tenants also submitted that the notice to vacate constituted a mutual agreement to end tenancy. I am unable to agree with this submission: the notice to vacate is simply a means of giving notice and attempts to provide for a smooth transition. I do not find that the Landlord consented to the Tenants' early end to the fixed term tenancy or agreed to waive any of their contractual rights.

The Tenancy Agreement included a clause providing liquidated damages of \$500 if the tenant brings an early end to the fixed-term tenancy. In order for a liquidated damages clause to be valid, it must be a genuine pre-estimate of loss, or it will be deemed to be an unenforceable penalty clause.

In this case, CT submitted that the Landlord does incur some direct advertising costs with respect to each time a unit is rented. However, CT submitted that the vast majority of the cost of rerenting related to the salaries of those who work for the Landlord and have to perform tasks to rerent rental units. The Tenants submitted that these costs are fixed costs, and would have been incurred in any event. The Landlord did not submit that, absent early terminations of fixed term tenancies, the Landlord would be able to have fewer staff or pay lower salaries, and I am unable to infer that the Landlord would be able to reduce its salary expenses if this or similar fixed tenancy breaches did not occur.

I therefore find that the liquidated damages clause did not represent a genuine pre-estimate of loss and is unenforceable.

Section 67 of the Act states that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

Therefore, I find the Landlord is entitled to a Monetary Order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement under section 67 of the Act, in the amount of \$1,850.00.

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

Under subsection 72(2) of the Act, I have discretion to permit the Landlord to retain the Tenant's security deposit in partial satisfaction of a monetary award.

As I have found the Landlord is entitled to a monetary award, and the Landlord has requested the retention of the security deposit, I therefore allow the Landlord to retain

the Tenant's security deposit of \$925.00, plus interest, in partial satisfaction of the monetary award. The interest on the deposit I calculate in accordance with the Regulations to be \$15.29.

Are the Tenants entitled to the return of their security deposit?

I have found that the Landlord is entitled to a monetary order in excess of the security deposit, and have allowed the Landlord is to offset the monetary order by retaining the security deposit, the Tenant's application is moot.

Therefore, the Tenants' application for the return of their security deposit is dismissed, without leave to reapply.

Is the either party entitled to recover the filing fee for this application from the other?

As the Landlord was largely successful in their application, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this application under section 72 of the Act.

Conclusion

I grant the Landlord a Monetary Order in the amount of **\$1,009.71** under the following terms:

Monetary Issue	Granted Amount
a Monetary Order for unpaid rent under section 67 of the Act	\$1,850.00
(less) authorization to retain all or a portion of the Tenant's security deposit in partial satisfaction of the Monetary Order requested under section 38 of the Act	(\$940.29)
authorization to recover the filing fee for this application from the Tenant under section 72 of the Act	\$100.00
Total Amount	\$1,009.71

The Landlord is provided with this Order in the above terms and the Tenant(s) must be served with **this Order** as soon as possible. Should the Tenant(s) 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.

The Landlord's application for a Monetary Order for unpaid rent is dismissed, without leave to reapply.

The Tenants' application for the return of their security deposit is dismissed, without leave to reapply.

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: April 18, 2024

Residential Tenancy Branch