



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Introduction

This hearing was convened in response to cross applications.

The Landlord filed an Application for Dispute Resolution, in which the Landlord applied for a monetary Order for money owed or compensation for damage or loss, for a monetary Order for unpaid rent, for a monetary Order for damage to the rental unit, to keep all or part of the security/pet damage deposit, and to recover the fee for filing an Application for Dispute Resolution.

The Tenant filed an Application for Dispute Resolution, in which the Tenant applied for the return of the security/pet damage deposit and to recover the fee for filing an Application for Dispute Resolution.

The participants were given the opportunity to present relevant oral evidence, to ask relevant questions, and to make relevant submissions. Each participant affirmed 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. The participants affirmed they would not record any portion of these proceedings.

Service of Notice of Dispute Resolution Proceeding (Proceeding Package)

HQ stated that the Landlord's Application for Dispute Resolution and Proceeding Package was sent to HB, by registered mail, on March 28, 2024. HB acknowledged receipt of these documents. I therefore find these documents were served in accordance with section 89 of the Act.

HB stated that the Tenant's Application for Dispute Resolution and Proceeding Package was sent to the Landlord, by registered mail, on April 17, 2204. HQ acknowledged receipt of these documents. I therefore find these documents were served in accordance with section 89 of the Act.

Service of Evidence

On June 07, 2024, the Landlord submitted evidence to the Residential Tenancy Branch. HQ stated that this evidence was served to the Tenant, by registered mail, on June 07, 2024. HB acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

On April 12, 2024, the Tenant submitted evidence to the Residential Tenancy Branch. HB stated this evidence was sent to the Landlord with the Proceeding Package. HQ stated that this evidence was not received.

I favor HB's testimony that the evidence of April 12, 2024, who stated that the evidence was included with the Proceeding Package, over HQ's testimony that it was not received. I find it difficult to believe that the Tenant would not include this evidence, as it supports the Tenant's claim. This evidence was, therefore, accepted as evidence for these proceedings. I note that some of this evidence was served to the Landlord again on June 13, 2024, which the Tenant acknowledged receiving. I further note that none of the evidence submitted on April 12, 2024 influenced my decision, unless it was also included in the evidence submitted by the Tenant on June 13, 2024.

On June 13, 2024, the Tenant submitted evidence to the Residential Tenancy Branch. HB stated this evidence was sent to the Landlord, by registered mail, on June 13, 2024. HQ acknowledged receipt of this evidence and it was accepted as evidence for these proceedings.

Preliminary Matter

After being advised that I do not have authority to consider claims for compensation that exceed \$35,000.00, HQ withdrew all of the issues in dispute in the Landlord's Application for Dispute Resolution, with the exception of the claim of \$30,000.00 for unpaid rent/lost revenue and \$5,000.00 for liquidated damages.

As HQ withdrew all other claims, any testimony regarding those other claims which was provided at the hearing is not being recorded here.

Issue(s) to be Decided

Is the Landlord entitled to compensation for unpaid rent/lost revenue and liquidated damages?

Should the security deposit be retained by the Landlord or returned to the Tenant?

Is the Tenant entitled to recover the fee for filing an Application for Dispute Resolution?

Background and Evidence

The Landlord and the Tenant agree that:

- the tenancy began in 2023
- the tenancy agreement declares that rent is due by the first day of each month, although the parties subsequently agreed it could be paid on the 6th day of each month
- the written tenancy agreement declares that the tenancy is for a fixed term, the fixed term of which ends on April 30, 2024
- monthly rent was \$15,000.00
- the Tenant paid a security deposit of \$7,500.00
- the Tenant paid a pet damage deposit of \$7,500.00
- a Ten Day Notice to End Tenancy for Unpaid Rent or Utilities was personally served to the Tenant on March 07, 2024, which declared the unit must be vacated by March 12, 2024
- the rental unit was vacated on March 11, 2024
- on February 16, 2024, the Tenant gave verbal notice of the Tenant's intent to vacate the unit on April 06, 2024
- the Tenant provided a forwarding address, in writing, on March 11, 2024
- as per the electronic communications at page 35 and 36 of the Tenant's evidence package, the Tenant agreed to allow the Landlord to keep \$6,449.90 from the Tenant's security deposit.

HB stated the security/pet damage deposit was paid on November 06, 2023. HQ does not know when it was paid.

HB stated that on March 05, 2024, she told an agent for the Landlord that she would provide him with a cheque for \$15,000.00, providing he would inspect the rental unit. HB stated that the agent for the Landlord walked away without taking the cheque and

that the Tenant made no further attempt to pay the rent that was due on March 06, 2024.

HQ argued that the Tenant could have paid the rent for March 05, 2024 by depositing it into the Landlord's bank account.

HB stated that there was a mutual agreement to end the tenancy, which HQ denies. HB argues that the text message at page 8 of the Tenant's evidence establishes there was a mutual agreement to end the tenancy on April 06, 2024.

The Landlord is seeking compensation for lost revenue of \$15,000.00 for April of 2024, as no rent was paid for that month. The Tenant agrees no rent was paid for April of 2024.

HQ stated that the rental unit was advertised on a popular website on March 09, 2024 and that the ad was regularly updated, but the unit was not re-rented for April of 2024. The Tenant does not dispute this testimony.

The Landlord is seeking compensation for liquidated damages, in accordance with the liquidated damages clause of the addendum to the tenancy agreement, which was submitted in evidence by the Landlord.

HQ stated that the agreed pre-estimate costs of \$5,000.00 for re-renting the rental unit referred to in the liquidated damages clause includes the cost of advertising, expenses for a property management company to travel to the remote location of the unit to show it to prospective renters, and commissions charged by third party referrals, which range between 5 and 10 percent of the total contact. HQ explained that if the total value of a fixed term tenancy was \$50,000.00, the Landlord could be subject to a commission fee of \$5,000.00.

Analysis

Is the Landlord entitled to compensation for unpaid rent/lost?

Section 26 of the Act requires a tenant to pay rent when it is due, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

On the basis of the undisputed evidence, I find that the Tenant did not pay rent of \$15,000.00 which was due on March 06, 2024. In the absence of evidence to establish that the Tenant had a legal right to withhold this rent, I find that the Tenant still owes the Landlord \$15,000.00 in rent for March of 2024. The Tenant did not have the right to withhold rent simply because an agent for the Landlord refused to inspect the rental unit.

On the basis of the undisputed evidence, I find that on March 07, 2024 the Tenant was personally served with a Ten Day Notice to End Tenancy for Unpaid Rent or Utilities, which declared that the Tenant must vacate the unit by March 12, 2024. As a Ten Day Notice to End Tenancy for Unpaid Rent or Utilities is to be effective ten days after it is served upon a tenant, I find the Notice should have declared that the unit must be vacated by March 17, 2024.

I find that even if an agent for the Landlord refused to accept a rent payment on March 05, 2024, the Tenant had the ability to pay the rent by mailing a cheque to the address provided on the Ten Day Notice to End Tenancy for Unpaid Rent or Utilities which was served to the Tenant on March 07, 2024.

On the basis of the undisputed evidence, I find that the Tenant vacated the unit on March 11, 2024, which is before the effective date of the Ten Day Notice to End Tenancy for Unpaid Rent or Utilities. I therefore find this tenancy ended on March 11, 2024, pursuant to section 41(1)(d) of the Act, when the unit was vacated.

I have placed no weight on the undisputed evidence that the Tenant gave verbal notice of the Tenant's intent to vacate the unit on April 06, 2024, as the tenancy ended prior to that date.

I find the Tenant has submitted insufficient evidence to establish that there was a mutual agreement to end the tenancy on April 06, 2024, which the Landlord denies. In reaching this conclusion I was heavily influenced by the absence of a written mutual agreement to end the tenancy, which is required by section 44(1)(c) of the Act. The text message at page 8 of the Tenant's evidence is not a written mutual agreement to end the tenancy. Rather, it is a text message asking the Tenant to confirm that they will be vacating the unit on April 06, 2024, in accordance with their verbal notice to end the tenancy.

On the basis of the undisputed evidence, I find that the parties entered into a fixed term tenancy agreement and that the fixed term of that agreement ended on April 30, 2024.

Section 45(2) of the *Residential Tenancy Act (Act)* allows a tenant to 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.

I find that the Tenant ended this tenancy prior to the end of the fixed term, when the unit was vacated on March 11, 2024. Rather than vacating the unit on March 11, 2024, I find that the Tenant should have paid the overdue rent after receiving the Ten Day Notice to End Tenancy for Unpaid Rent or Utilities, and the Tenant should have remained in the unit until the end of the fixed term of the tenancy.

As the Tenant ended this fixed term tenancy prior to the scheduled end date, I find that the Tenant must compensate the Landlord, pursuant to section 67 of the *Act*, for any losses the Landlord experienced as a result of the Tenant vacating the unit prior to the end of the fixed term of the tenancy.

I find that the Landlord made reasonable efforts to re-rent by advertising it in a timely manner, however the Landlord was unable to find a new tenant for April of 2024. I find that the Landlord would have collected rent for April if the tenancy had continued until the end of the fixed term of the tenancy and I therefore find that the Tenant must pay the Landlord \$15,000.00 in compensation for this loss of revenue.

Is the Landlord entitled to compensation for liquidated damages?

On the basis of the undisputed evidence, I find that the liquidated damages clause in the addendum to the tenancy agreement requires the Tenant to pay liquidated damages of \$5,000.00 if the Tenant ends the tenancy prematurely.

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, which relates to liquidated damages, reads, in part:

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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

Although liquidated damages of \$5,000.00 is a relatively large amount, it is reasonable amount for a unit that rents at a monthly rate of \$15,000.00. Units that rent for this amount may remain vacant for extended periods of time, subjecting the Landlord to significant losses. As I the amount of the liquidated damages agreed upon is reasonable, I find that the Tenant must pay the agreed upon liquidated damages.

Should the security deposit be returned to the Tenant or retained by the Landlord?

Section 38 of the Act states that within 15 days of either the tenancy ending or the date that the landlord receives the tenant's forwarding address in writing, whichever is later, a

landlord must repay a security/pet damage deposit plus interest to the tenant or make an application for dispute resolution to claim against it.

As the Tenancy end on March 11, 2024 and the forwarding address was provided on March 11, 2024, the Landlord had until March 26, 2024 to file an Application for Dispute Resolution claiming against the pet damage/security deposit. As the Landlord's Application for Dispute Resolution was filed on March 26, 2024, I find it was filed on time.

Section 38(4)(a) of the Act allows a landlord to keep an amount from a security deposit or a pet damage deposit if, at the end of a tenancy, the tenant agrees in writing the landlord may retain the amount to pay a liability or obligation of the tenant.

On the basis of the testimony of the parties and the electronic communications located at page 35 and 36 of the Tenant's evidence, I find that the Tenant gave the Landlord written permission to retain \$6,449.90 from the Tenant's security deposit for liabilities/damage. I therefore find that the Landlord had authority to retain this amount, pursuant to section 38(4)(a) of the Act, leaving a balance of \$1,050.10 of the security deposit and \$7,500.00 of the pet damage deposit (\$8,550.10).

Under section 72 of the Act, I allow the Landlord to apply the remaining \$8,550.10 of the pet damage/security deposit to the monetary claim being made by the Landlord.

The Landlord must pay the Tenant interest on the full deposits of \$15,000.00 for the period between November 06, 2023, which is when the Tenant asserts it was paid, and March 17, 2024. March 17, 2024 is, on or about, the date the Tenant permitted the Landlord to retain \$6,449.90 from the security deposit. Interest for this period is \$130.08, which the Landlord may apply to the monetary claim being made by the Landlord.

The Landlord must also pay the Tenant interest on the remaining deposits of \$8,550.10 for the period between March 17, 2024 and the date of this decision. Interest for this period is \$64.97, which the Landlord may apply to the monetary claim being made by the Landlord.

As the Landlord has established a right to retain the Tenant's security/pet damage deposit plus interest, I dismiss the Tenant's application for the return of the deposits, without leave to reapply.

Is the Tenant entitled to recover the fee for filing an Application for Dispute Resolution?

The Tenant has failed to establish the merit of the Application for Dispute Resolution, I dismiss the Tenant's application to recover the fee for filing the Application for Dispute Resolution, without leave to reapply..

Conclusion

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

The Landlord has established a monetary claim, in the amount of \$35,000.00, which includes \$15,000.00 in unpaid rent, \$15,000.00 in lost revenue, and \$5,000.00 in liquidated damages,. Pursuant to section 72(2) of the *Act*, I authorize the Landlord to retain the Tenant's security/pet damage deposit, plus interest, in the amount of \$8,745.15 in partial satisfaction of this monetary claim.

Based on these determinations I grant the Landlord a monetary Order for the balance of \$26,254.85. 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: June 27, 2024

Residential Tenancy Branch