



Dispute Resolution Services

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Residential Tenancy Branch
Ministry of Housing and Social Development

DECISION

Dispute Codes MNDC, MNSD, & FF

Introduction

This hearing dealt with an application by the landlord seeking compensation after experiencing a loss due to the tenant's breach of the fixed term lease. Both parties appeared, gave affirmed testimony and were provided the opportunity to present their evidence orally and in written and documentary form, and to cross examine the other party, and make submissions to me.

Although there are two tenants contained in the tenancy agreement, the landlord did not serve both tenants in accordance with section 89 of the *Act*. Only the tenant listed in this decision was served by registered mail pursuant to section 89.

The landlord attempted to serve the other tenant by registered mail at the tenant's place of employment. This is not an approved method of serving documents under section 89 of the *Act* and I cannot find that the tenant was served with proper notice of this application and hearing.

I accept that the two tenants were co-tenants. Co-tenants are jointly and severally liable for any debts or damages relating to the tenancy. This means that the landlord can recover the full amount of rent, utilities or any damages from all or any one of the tenants. The responsibility falls to the tenants to apportion among themselves the amount owing to the landlord.

I proceeded with the hearing, having accepted that one of the tenants was served in accordance with section 89 of the *Act*.

Issues(s) to be Decided

Has the landlord established loss or damages resulting from the tenants' breach of the fixed term lease?

Background and Evidence

The parties entered into a fixed term tenancy commencing on March 1, 2010 and ending effective February 28, 2011. The monthly rent of \$1,700.00 was due on the 1st of each month and a security deposit of \$850.00 was paid on February 19, 2010.

The tenants gave notice to end this fixed term tenancy on March 15, 2010 but later withdrew the notice. The tenants then gave notice again at the end of April 2010 effective May 31, 2010.

The landlord seeks the following loss resulting from the tenants' breach of the fixed term tenancy:

Loss of partial rent for June 2010 (8 days at \$56.66 per day)	\$453.33
Fee paid by landlord to property management company for securing new tenant (\$850.00 plus HST)	\$952.00
Cost of running credit checks against potential new tenants	\$91.35
Recovery of \$50.00 filing fee paid for this application	\$50.00
TOTAL	\$1,646.68

The landlord submitted that they are seeking the actual costs due to the breach of the fixed term tenancy and not the \$2,000.00 liquidated damages which were agreed to in the tenancy agreement. The landlord seeks to retain the tenants' security deposit plus interest in partial satisfaction of this claim.

The tenant acknowledged the breach of the lease and disclosed the personal circumstances which were the cause of the decision to break the lease. The tenant conceded to the landlord retaining the security deposit in satisfaction of this claim.

Analysis

I note that the tenancy agreement provides that in the event that the tenant ends the tenancy before the effective end date of the lease than the sum of \$2,000.00 shall be paid by the tenant to the landlord.

A liquidated damages clause is 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 do not find that the sum of \$2,000.00 to be a reasonable estimate of potential loss the landlord might experience in the event that the fixed term tenancy is broken. A reasonable pre-estimate would, in the given circumstances, be the fee charged by the management company to find new tenants or the equivalent of half a month's rent. However, when a liquidated damages clause is found to be a penalty it can still be considered the 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.

I accept the landlord's claim in part. I accept that the tenants breached the fixed term lease and as a result the landlord experienced a loss. I accept the 8 days of lost rent for the sum of \$453.33, the \$100.00 move in fee which is consistent with regulation 7(1)(f) and the administration fee paid to the property management company for finding a new tenant for the sum of \$952.00. I do not accept the landlord's claim for the additional cost associated with conducting credit checks on perspective tenants. I find that this sum is a business cost the landlord has chosen to undertake, but is not required. Further, I find that this cost should be part of or contained within the fee charged by the property management company.

I find that the landlord has established a total monetary claim for the sum of **\$1,555.33** arising out of the tenants' breach of the fixed term tenancy. This sum includes the recovery of the \$50.00 filing fee paid by the landlord for this application. I Order that the landlord may retain the tenants' security deposit of \$50.00 in partial satisfaction of this claim and issue the landlord a monetary Order for the remaining balance owed of **\$705.33**.

Conclusion

The landlord's application seeking a monetary claim due to the tenants' breach of the fixed term tenancy is granted. I have issued the landlord a monetary Order for the sum of **\$705.33**. This Order must be served on the tenant and may be 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 *Residential Tenancy Act*.

Dated: November 23, 2010.

Dispute Resolution Officer