



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding E.Y. Properties Ltd.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with applications by both the tenant and the landlord. The tenant applied for the return of his security deposit; for money owed or compensation for damage or loss under the Act, Regulation, or tenancy agreement; and to recover his RTB filing fee. The landlord applied for a monetary order for unpaid rent and for money owed or compensation for damage or loss under the Act, Regulation, or tenancy agreement; to retain all or part of the security deposit; and to recover their RTB filing fee.

Both the tenant and a representative of the landlord attended the teleconference hearing and gave affirmed evidence.

Issue(s) to be Decided

Is the tenant entitled to the return of his security deposit?

Is the tenant 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 a monetary order for unpaid rent and/or for money owed or compensation for damage or loss under the Act, Regulation, or tenancy agreement?

Background and Evidence

The tenancy agreement signed by the parties on March 13, 2014 indicates the tenancy was to start on April 1, 2014 for a fixed term of one year. The tenant was obligated to pay rent of \$1,050.00 monthly in advance on the first of the month. The tenant also paid a security deposit of \$525.00 and a key deposit of \$50.00.

The landlord's records indicate the tenant paid the landlord a total of \$1,675.00. This amount was for April 2014 rent of \$1,050.00, April parking of \$50.00, the security deposit of \$525.00 and the key deposit of \$50.00.

The tenant gave evidence that he decided not to move in to the rental unit. He advised the property manager on March 22, 2014 that he would not be moving in. The property manager was away at the time, but she told him they would need to meet. The tenant gave evidence that he met with the property manager on April 1, 2014 and signed a document titled "Early Termination by Tenant" (the "Early Termination Form"). The tenant says the property manager told him at the time that he would have to pay \$400.00 if he broke the lease, and so she was only going to keep \$400.00.

The tenant provided his forwarding address in writing on the Early Termination Form on April 1, 2014. His evidence is that he "got a bill in the mail", referring to a letter from the landlord dated May 29, 2014 enclosing a document titled "Security Deposit Statement and Authorization", which indicates the tenant should pay the landlord \$1,050.00 rent for May 2014 and \$400.00 Liquidated Damages for Early Termination less \$575.00 for the security and key deposits, for an amount due from the tenant of \$875.00.

The tenancy agreement contains a clause as follows:

5. LIQUIDATED DAMAGES. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$400.00 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated. (the "Liquidated Damages Clause")

The landlord's representative gave evidence that the landlord tries to re-rent units as soon as possible. She notes that the tenant signed the Early Termination Form which reads, in part:

"I/We hereby give notice that I/we will terminate my/our tenancy in the above suite on Mar. 22/14. I/We are aware that this notice will result in my/our not completing the fixed term tenancy agreement between us and I/we understand that I am/we are therefore responsible to pay rent until Mar. 31/15 (end date of agreement) if you are unable to rent this suite before then."

The landlord gave evidence that they were not able to re-rent the rental unit until June 1, 2014. For that reason, they claim rent of \$1,050.00 from the tenant for May 2014. The landlord also claims liquidated damages of \$400.00.

The landlord gave evidence that after the tenant gave notice on March 22, 2014, the landlord showed the suite and advertised it. She said the building was newly opened in December 2013 and in March and April 2014 there were a couple of other one bedroom units vacant.

The landlord gave evidence that on April 4, 2014, the landlord signed a tenancy agreement with new tenants for the rental unit for a tenancy starting June 1, 2014. She said April and May can be difficult months to rent in Victoria since students are leaving for the summer.

Asked what costs the landlord incurred to re-rent the rental unit, the landlord's representative gave evidence that the landlord incurred advertising costs and the time of management. She said they advertise on the internet, their own website, banners outside the building, and a military publication. Time is spent by the property manager or caretaker (depending on who is available) and both are on salary. The landlord's time is spent showing the rental unit and checking out new potential tenants.

The landlord provided the following evidence of advertising costs: Invoices from the military publication (5 weekly ads in March 2014, 4 weekly ads in April 2014), a copy of a full page ad in the military publication advertising the building generally (not specific suites), invoices from Used Victoria dated March 7, 17, 21, and 28, 2014, a copy of the ad placed on the Used Victoria website advertising a brand new building including bachelor, one bedroom, two bedroom, and three bedroom suites.

The tenant's position is that he paid rent for the month of April 2014 and does not feel he should be responsible for any more costs.

Analysis

The process for the return of security deposits is set out in Section 38 of the Act. Pursuant to Section 38(1), the landlord must either repay the security deposit or apply for dispute resolution to make a claim against the security deposit within 15 days of the date the tenancy ends or the date the landlord receives the tenant's forwarding address in writing (whichever is later). Alternatively, pursuant to Section 38(4)(a), a landlord may retain all or part of a security deposit if the tenant agrees in writing.

According to the Early Termination Form, the tenancy ended on March 22, 2014 and the tenant provided his forwarding address to the landlord in writing on April 1, 2014. The landlord did not apply for dispute resolution to make a claim against the security deposit within 15 days. Also, the tenant did not agree in writing to the retention of any part of the security deposit. The landlord is therefore obligated to return the entire security deposit to the tenant.

According to Section 38(6), a landlord who fails to follow Section 38(1) must pay the tenant double the amount of the security deposit. In this case, the landlord failed to repay the tenant the amount of \$525.00 from the security deposit. The tenant is therefore entitled to an order for twice that amount, which is \$1,050.00. The tenant is also entitled to recover his key deposit of \$50.00 from the landlord, however there is no provision in the Act for doubling the key deposit. The tenant is therefore due \$1,100.00 from the landlord.

I find it was reasonable for the landlord to accept new tenants on April 4, 2014 for a tenancy starting June 1, 2014, rather than continuing to seek tenants for a tenancy starting May 1, 2014. Given the time of year and the other vacancies in the building, there was a real risk that had the landlord not accepted the June 1st new tenants, it might have taken even longer to re-rent the rental unit. For that reason, I find the landlord is entitled to claim a rental loss of \$1,050.00 for the month of May 2014 from the tenant.

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, the Liquidated Damages Clause is held out as a genuine pre-estimate of the landlord's costs of re-renting the rental unit. I find that \$400.00 is not a genuine pre-estimate of those costs. Based on the landlord's evidence, it does not appear that the landlord incurred any additional costs to re-rent the rental unit. The building was almost new and the landlord was advertising many rental units in the same advertisements. The staff who spent time re-renting the suite work on a salary (not hourly) basis. Even if the advertising expense were divided among all available suites, including the rental unit in this application, the landlord's costs of re-renting do not appear to approach \$400.00. For that reason, I find the Liquidated Damages Clause is a penalty rather than a genuine pre-estimate of loss and for that reason I find the clause to be unenforceable.

I dismiss the claim for liquidated damages. The total amount due the landlord from the tenant is therefore \$1,050.00.

Since both parties have had some success in their applications, each will bear their own filing fee. Setting off the amount due the tenant (\$1,100.00) against the amount due the landlord (\$1,050.00), I find the landlord owes the tenant \$50.00. I grant the tenant a monetary order for that amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the tenant a monetary order for \$50.00.

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: August 29, 2014

Residential Tenancy Branch

