



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PROTECTION PROPERTY MANAGEMENT LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

MNDC, MNSD, FF

Introduction

This hearing dealt with applications from both the landlord and the tenants under the *Residential Tenancy Act* (the *Act*). The landlord applied for:

- a monetary order for unpaid rent and for damage to the unit, site or property pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenants applied for:

- a monetary order for compensation for damage or loss under the Act, regulation or tenancy agreement pursuant to section 67;
- a monetary order for the return of double the security deposit pursuant to section 38 and 67 of the Act;
- authorization to recover their filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed that the landlord served the tenants with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on December 17, 2015 then again on June 20, 2016. Both parties also confirmed that the tenants served the landlord with their notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail on January 7, 2016. As both parties have attended and have confirmed receipt of the notice of hearing package and the submitted documentary evidence, I am satisfied that both parties have been properly served as per sections 88 and 89 of the Act. Both parties are deemed served 5 days later as per section 90 of the Act.

At the outset the landlord's agent (the landlord) wished to amend their application due to a clerical error in the spelling of the tenant, R.F.G.'s name ending with an "M" instead of an "N". The tenant, R.F.G. confirmed the proper spelling of his name and that there were no issues for the amendment. As such, the landlord's application shall be amended by consent.

During the hearing it was clarified with both parties that the tenants application for return of double the FOB deposit was not applicable as section 38 only refers to the security and pet damage deposits. The tenants also confirmed during the hearing that the original \$150.00 FOB deposit was returned to the tenants by the landlord. As such no further action is required for this portion of the tenants' application.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for money owed or compensation for damage or loss and recovery of the filing fee?

Is the landlord entitled to retain all or part of the security deposit?

Are the tenants entitled to a monetary order for the return of double the security and/or fob deposits and recover of the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the both the landlord's claim and the tenants' cross claim and my findings around each are set out below.

This tenancy began on January 1, 2015 on fixed term tenancy ending on December 31, 2015 as shown by the submitted copy of the signed tenancy agreement dated November 13, 2014. The monthly rent was \$1,750.00 payable on the 1st day of each month and a security deposit of \$875.00 was paid. Both parties confirmed that the landlord currently holds the \$875.00 security and \$150.00 FOB deposits. Both parties confirmed that the tenants provided their forwarding address in writing to the landlord on November 30, 2015. Both parties confirmed that the tenants provided notice to end the tenancy on November 30, 2015.

The landlord seeks a monetary claim of \$1,223.75 which consists of:

\$1,023.75	lease break fee for the cost of re-renting
\$100.00	Move-Out Fee
\$50.00	Recovery of Filing Fee

The landlord states that the tenants breached the fixed term tenancy by pre-maturely ending the tenancy on November 30, 2015 instead of December 31, 2015. The tenants confirmed ending the tenancy on November 30, 2015 prematurely.

The tenants disputes the landlord's claim for a lease break fee stating that the landlord has no such condition for breaching the lease, no proof of an actual fee being paid and provided testimony that the landlord was able to re-rent the unit on December 1, 2015 after only 1 showing in 1 night.

The landlord stated that on "B2", page 2 of the signed tenancy agreement under section 1, Leasebreach states,

If the tenant vacates prior to expiration of Lease the tenant will be responsible for any costs incurred by the Landlord to re rent the premise. This will include but not limited to loss of rent up to the expiration of the lease, fees paid to management agencies, credit checks and advertising. The Landlord has a duty to mitigate losses by acting in a prompt manner to re rent the premise.

The landlord also stated that a \$1,023.75 charge was paid by the landlord to her agent as part of a standard agreement as shown in the submitted copy of the invoice dated December 15, 2015 provided on "F1" of the landlord's documentary evidence.

The landlord provided testimony that a new tenant was not secured until December 1, 2015.

The tenants both conceded and accepted the \$100.00 move-out fee imposed by the strata. The tenant claimed that they were never notified that there was a move-out fee, but will agree to this portion of the landlord's claim.

The tenants seek a monetary claim of \$2,100.00 which consists of:

\$1,750.00 Return of Double the \$875.00 security deposit (Sec.38)
\$50.00 Recovery of Filing Fee

Both parties confirmed that this tenancy ended on November 30, 2015 and that the tenants provided their forwarding address in writing to the landlord on November 30, 2015. The landlord applied to dispute the return of the security deposit on December 14, 2015. The tenants seek compensation under section 38 (6) of the Act as the landlord has failed to comply with the Act under section 38 (1) of the Act.

Analysis

Lease Breach Fees also known as liquidated damages are referred to under Residential Tenancy Policy Guideline #4 and states in part that 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.

The liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting the rental unit after a tenant breach. The cost of re-renting a rental unit to new tenants is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why landlords enter into fixed-term tenancy agreements is to attempt to limit the number of times the landlord must incur the costs of re-renting.

In this case the landlord's liquidated damages clause states,

If the tenant vacates prior to expiration of Lease the tenant will be responsible for any costs incurred by the Landlord to re rent the premise. This will include but not

limited to loss of rent up to the expiration of the lease, fees paid to management agencies, credit checks and advertising. The Landlord has a duty to mitigate losses by acting in a prompt manner to re rent the premise.

A "Leasebreach" clause was included in the signed tenancy agreement, but that it failed to identify an amount agreed upon in advance by both parties. It is clear that the \$1,023.75 amount is an agreed amount between the landlord and his agent and could have been provided in advance to the tenant for their consideration prior to entering into the agreement. As such, I find that the landlord's monetary claim for a "lease breach fee or liquidated damages" is dismissed without leave to reapply as this constitutes a penalty and is unenforceable.

The tenants have conceded and agreed to a \$100.00 move-out fee imposed by the strata.

The landlords have established a \$100.00 monetary claim.

The tenants' are entitled to the return of the original \$875.00 security deposit. The tenants' have failed to provide sufficient evidence to satisfy me that the landlords failed to comply with section 38 (1) of the Act. Both parties agreed that the tenancy ended on November 30, 2015 and that the tenants had provided their forwarding address in writing on the same date. The landlord's application clearly shows that the landlord applied for dispute to retain the security deposit on December 14, 2015. This is clearly within the allowed 15 day period. As such, the tenants' application for compensation under section 38 (6) is dismissed.

I find that as both parties have not been substantially successful in their monetary applications, I decline to make any order regarding the recovery of the filing fees for both parties.

Conclusion

In offsetting these claims, I grant the tenants a monetary order of \$775.00.

The order must be served to the landlord. Should the landlord fail to comply with the order, the order may be filed in the Small Claims Division of the Provincial 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: August 4, 2016

Residential Tenancy Branch

