



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, MNDL-S, MNRL-S, FFL

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a Monetary Order for unpaid rent pursuant to section 67;
- a Monetary Order for damages, pursuant to section 67;
- a Monetary Order for damage or compensation under the *Act*, pursuant to section 67;
- authorization to retain the tenant's security deposit in part satisfaction of their monetary claim pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open for 18 minutes in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 p.m. The president of residential properties (the "landlord") attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord testified that she served the tenant the notice of dispute resolution package by registered mail on December 20, 2017. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. I find that the tenant was deemed served with this package on December 25, 2017, five days after its mailing, in accordance with sections 89 and 90 of the *Act*.

Issue(s) to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to section 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damages, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to a Monetary Order for damage or compensation under the *Act*, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to retain the tenant's security deposit in part satisfaction of their monetary claim, pursuant to section 38 of the *Act*?
5. Is the landlord entitled to recover the filing fee for this application from the tenant pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of her submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The landlord provided undisputed testimony that this unit was rented out by a different tenant (tenant #1) starting July 23, 2014 and that the tenant had moved in with tenant #1. A move in condition inspection report was completed and signed by the landlord and tenant #1.

When tenant #1 moved out, the landlord and the tenant entered into a new one-year fixed term tenancy which began on September 1, 2017 and was terminated in November 2017 by the tenant. Monthly rent in the amount of \$848.00 was payable on the first day of each month. The security deposit paid by tenant #1, in the amount of \$397.50, was retained by the landlord and applied to the new tenancy between the tenant and the landlord.

The written tenancy agreement which began on September 1, 2017 was signed by both parties and a copy was submitted for this application. This tenancy agreement contained a liquidated damages clause which states that if the tenant ends this tenancy agreement less than 12 months from the start of this tenancy agreement, then the tenant agrees to pay \$500.00 to the landlord as a genuine pre-estimate of the landlord's costs for re-renting the rental unit. The tenant initialed this clause in the tenancy agreement.

The landlord testified that the tenant did not pay rent on November 1, 2017. On November 2, 2017, the building manager posted a 10 Day Notice to End Tenancy for Unpaid Rent (the "10 Day Notice") on the tenant's door. The landlord testified that on November 14, 2017 the 10 Day Notice was still on the tenant's door, at that point the building manager attached a 24 hour notice of entry to the tenant's door. The landlord testified that on November 15, 2017 the building manager entered the unit and it was clear that the tenant had moved out but had left a large amount of her belongings.

The landlord testified that the tenant called on December 4, 2017 and apologized for skipping out on rent and requested that she be permitted back in the unit to collect some of her belongings. The landlord agreed to allow her back into the suite to collect her belongings and arranged for the tenant and the building manager to complete the move out inspection and inspection report at 4 p.m. on December 5, 2017.

The landlord testified that the tenant was allowed in to collect her belongings on December 5, 2017 but the tenant left the unit before 4 p.m. and did not complete the move out inspection or inspection report with the landlord. Prior to leaving the suite, the tenant filled in her forwarding address on the move out inspection report, but did not sign it.

The landlord testified that the building manager tried calling and texting the tenant to come back and complete the report with him but the tenant did not respond. The landlord testified that the landlord did not provide the tenant with a second opportunity, in writing, to complete the move out condition inspection and inspection report.

The landlord testified that she started marketing the unit for rent sometime between December 5th and 8th. The landlord testified that the unit was listed on the landlord's website, craigslist, Kijiji, and several other websites and that the unit was successfully rented out for January 2018. The landlord testified that they could not list the property earlier as the tenant had left a large amount of belongings which either had to be stored or thrown out. The landlord further testified that the unit was dirty and needed a lot of cleaning and that it could not be shown in the state left by the tenant.

The landlord's application for a monetary award of \$3,076.52 included the following items outlined on the Monetary Order Worksheet entered into written evidence by the landlord.

Item	Amount
------	--------

November rent	\$835.00
December rent	\$835.00
Liquidated damages	\$500.00
BC Hydro bill	\$54.12
Manager's labour for suite cleaning	\$312.00
Lock change	\$72.00
New drapes	\$218.40
Dump fee	\$250.00
Total of Above Items	\$3,076.52

The landlord's application also included the recovery of the landlord's \$100.00 filing fee. The landlord testified that she accidentally put November and December rent in the amount of \$835.00 on the monetary order worksheet when it is actually \$848.00. The landlord testified that this was her error and that she is only seeking \$835.00 per month for rent rather than the actual rent of \$848.00.

The landlord testified that the tenant did not pay her BC Hydro bill with a billing period from August 18, 2017 to October 13, 2017. The landlord testified that the suite was not cleaned and that the building manager cleaned the unit for 26 hours at \$12 per hour for a total of \$312.00. The landlord testified that a large amount of the tenant's belongings were left in the unit including a couch and a television. The landlord had to contract a disposal service to remove these items. The landlord testified that the tenant did not return any of her keys so for security reasons, the locks needed to be replaced.

The landlord testified that the drapes in the tenant's apartment could not be cleaned and required replacing. The landlord acknowledged that in her application she only claimed \$36.00 for the cleaning of the drapes, not the cost of replacing them. The landlord testified that at the time of applying for dispute resolution she thought the drapes could be cleaned and once it became apparent that they needed to be replaced, she did not amend her application. The landlord testified that she is only seeking the \$36.00 for the cleaning of the drapes but wanted it to be known that in the end, they had to be replaced. The landlord did not know when the drapes were purchased and installed in the suite.

In support of the items identified in the landlord's claim for a monetary award, the landlord entered into evidence invoices and receipts for the following items:

Item	Amount
BC Hydro bill	\$54.12
Manager's labour for suite cleaning	\$312.00

Lock change	\$72.00
New drapes	\$218.40
Dump fee	\$250.00
Total of Above Items	\$906.52

Analysis

Monetary Claim for November and December 2017 Rent

Under section 7 of the Act a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

In this case, the tenant ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement. Pursuant to section 7, the tenants are required to compensate the landlord for that loss of rental income. The landlord testified that within three days of the tenant removing her belongings from the rental unit, the unit was cleaned and listed for rent on several websites. Subsequently, the unit was rented out for January 2018. I find that the landlord mitigated her damages by promptly cleaning the unit and advertising it for rent. The tenant, pursuant to section 7 and Policy Guideline 16, is therefore liable for November and December 2017 rent in the amount of \$1,670.00

Liquidated Damages Claim

Policy Guideline #4 states 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.

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.

In this case, I find that the tenant signed and fully understood the tenancy agreement and that she is liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damages clause was clearly and carefully laid out in the tenancy agreement and detailed the consequences of breaking the fixed term tenancy agreement to the parties.

I find that the amount of \$500.00 stipulated to cover the administration costs that the landlord would have likely incurred at the time the tenancy agreement was entered into is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy.

I find that the tenant failed to provide any evidence to show that the costs stated by the landlord were not a genuine pre-estimate of their losses or that they were a penalty. I find that the tenants are liable to pay liquidated damages in the amount of \$500.00.
Monetary Claim for Hydro, Cleaning, Locks, Drapes and Garbage Removal

Section 37 of the *Act* states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

Section 67 of the *Act* establishes 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. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

The landlord's application seeks to recover a cleaning fee for the drapes in the amount of \$36.00 but the landlord testified that the drapes could not be cleaned. As the drapes were not cleaned, I find that the tenant is not liable for the \$36.00 cleaning charge. The landlord did not amend her application to include the cost of new drapes; as the tenant did not have notice of this claim, I find that the landlord cannot succeed in this claim. Furthermore, the landlord was unable to provide me with a date of purchase/installation of the drapes, so I am unable to determine if the useful life of the drapes, pursuant to Policy Guideline 40, has expired. I dismiss the landlord's claim for the cost of cleaning and or replacing the drapes.

The landlord provided undisputed testimony that the tenant did not pay her BC Hydro bill, did not clean her apartment, did not return her keys and left possessions in the suite requiring disposal. Based on the undisputed testimony of the landlord, and the receipts/bills provided by the landlord, I find that the tenant is liable for the following:

Item	Amount
BC Hydro bill	\$54.12
Manager's labour for suite cleaning	\$312.00
Lock change	\$72.00
Dump fee	\$250.00
Total of Above Items	\$688.12

Condition Inspection Reports

Section 35 of the *Act* states that at the end of a tenancy the landlord must offer the tenant at least two opportunities to conduct the move out condition inspection. Section 17 of the regulations to the *Act* require the landlord to provide the second opportunity in writing.

The landlord testified that a second opportunity to complete the report, in writing, was not provided to the tenant. I find that the landlord did not comply with section 35 of the *Act*.

Section 36 of the *Act* states that if the landlord does not provide the tenant with two opportunities to complete the move out inspection, the right of the landlord to claim against the security deposit for damage to the residential property is extinguished.

Pursuant to section 36 of the *Act*, I find that the landlord's eligibility to claim against the security deposit for damage arising out of the tenancy is extinguished.

Security Deposit Doubling Provision

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit or file for dispute resolution for authorization to retain the deposit, within 15 days after the later of the end of a tenancy and the tenant's provision of a forwarding address in writing. If that does not occur, the landlord is required to pay a monetary award, pursuant to section 38(6)(b) of the *Act*, equivalent to double the value of the security deposit.

However, this provision does not apply if the landlord has obtained the tenant's written authorization to retain all or a portion of the security deposit to offset damages or losses arising out of the tenancy (section 38(4)(a)) or an amount that the Director has previously ordered the tenant to pay to the landlord, which remains unpaid at the end of the tenancy (section 38(3)(b)).

Section C(3) of Policy Guideline 17 states that unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the *Act*.

In this case, while the landlord made an application to retain the tenant's security deposit within 15 days of receiving the tenant's forwarding address in writing, she is not entitled to claim against it due to the extinguishment provisions in section 36 of the *Act*. I find that the tenant is entitled to receive double the security deposit for a total of \$795.00. Although the tenant did not apply to obtain a return of double the deposit, she did not specifically waive her right to it. Accordingly, I must consider the doubling provision as per Residential Tenancy Policy Guideline 17.

Conclusion

Section 72(2) states that if the director orders a party to a dispute resolution proceeding to pay any amount to the other, the amount may be deducted in the case of payment from a tenant to a landlord, from any security deposit or pet damage deposit due to the tenant. This provision applies even though the landlord's right to claim from the security deposit has been extinguished under section 36 of the *Act*.

As the landlord was successful in her application, I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant, pursuant to section 72 of the *Act*.

Pursuant to section 67 and 72 of the *Act*, I issue a monetary Order for landlord under the following terms:

Item	Amount
November rent	\$835.00
December rent	\$835.00
Liquidated damages	\$500.00
BC Hydro bill	\$54.12
Manager's labour for suite cleaning	\$312.00
Lock change	\$72.00
Dump fee	\$250.00
Filing fee	\$100.00
Less doubled security deposit	-\$795.00
Total of Above Items	\$2,163.12

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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.

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: June 25, 2018

Residential Tenancy Branch