



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFT MNSD MNDCL-S MNRL-S

Introduction

This hearing dealt with applications from both parties for compensation under the *Act*.

The landlord applied for:

- a Monetary Order pursuant to section 67 of the *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

The tenant applied for:

- a Monetary Order pursuant to section 67 of the *Act*;
- a return of the security deposit pursuant to section 38 of the *Act*; and
- a return of the filing fee pursuant to section 72 of the *Act*.

Both parties attended the hearing with the tenant being represented by her advocate, Y.H. and the landlord represented by agent, A.G. (the “landlord”). All parties were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses.

Both parties confirmed receipt of each other’s applications for dispute resolution and evidentiary packages. Both parties are found to have been duly served in accordance with the *Act*.

Issue(s) to be Decided

Is either party entitled to a monetary award?

Can either party recover the filing fee?

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

Background and Evidence

The parties explained this tenancy began on October 1, 2017 and ended on October 30, 2017. Rent was \$1,100.00 per month and a security deposit of \$550.00 paid at the outset of the tenancy continues to be held by the landlord.

The tenant said she was seeking a return of her security deposit in its entirety, along with a monetary award of \$101.58 related to the loss of quiet enjoyment. The tenant said she had suffered a loss under the tenancy as a result of the landlord's inaction related to an allegedly loud neighbour who occupied the suite above her. The tenant described being driven to move from the property because of the disturbances created by this person above her unit and she sought a return of her expenses related to the move. The tenant explained she had originally signed a fixed-term tenancy agreement which was set to expire in September 30, 2018.

The landlord explained she was seeking a monetary award as a result of the above noted breach. The landlord said she was unable to re-rent the suite until December 1, 2018 and the landlord sought a monetary award for unpaid November 2017 rent, along with \$1,100.00 for a breach of the liquidated damages clause. The landlord said she posted the rental unit on Craigslist immediately after the tenant's move out on October 26, 2017. She said the unit was shown three times in November 2018, on the 7th, 10th and 16th and was re-rented for December 1, 2017 following this final showing.

The landlord disputed that the tenant above the rental unit in question had caused a significant amount of noise, stating that she had received no complaints prior or following the tenancy of L.J., had no record of complaints and she attributed any noise which may have emanated from above to the everyday goings on of a building containing multiple units.

The parties could not recall exactly which date the tenant's forwarding address had been provided to the landlord in writing; however, both parties confirmed it was provided to the end of tenancy near the time of move out. A review of the evidence submitted by the tenant revealed an emailed letter dated June 6, 2018 in which the tenant's forwarding address was provided to the landlord in writing.

Analysis – Tenant's Application

The tenant has applied for a return of her security deposit of \$550.00 which the landlord continues to hold. The tenant said in addition to the return of her security deposit, she

sought \$101.58 for loss as it related to the tenancy. Specifically, expenses incurred while moving, medication required to address health problems which arose from her experiences with the upstairs tenants along with alleged physical and psychological harm.

Section 38 of the *Act* requires a landlord to either return a tenant's security or pet deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the *later* of the end of a tenancy and upon receipt of the tenant's forwarding address in writing. In this case, the tenant's forwarding address was sent to the landlord in writing via email on June 6, 2018. ~~The landlord therefore had until June 21, 2018 to apply for dispute or to retain the deposit.~~ **A review of the landlord's application for dispute revealed she applied to withhold the tenant's deposit on November 14, 2018.** If deposit is not returned and no application is submitted, 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 or pet 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 as per section 38(4)(a). A landlord may also under section 38(3)(b), retain a tenant's security or pet deposit if an order to do so has been issued by an arbitrator.

~~I order the landlord to return the outstanding security deposit of \$1,100.00 to the tenant. I am doubling the tenant's security deposit pursuant to section 38 of the Act as a review of the landlord's application shows that the landlord did not apply to retain the tenant's security deposit until June 28, 2018, seven days after the expiry of the time limit provided by section 38 of the Act.~~

I find the landlord has applied within the 15 day time period following the conclusion of the tenancy and therefore decline to award the tenant a return of her security deposit, as loss has resulted from her non-compliance with the Act.

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. In this case, the onus is on the tenant to prove her entitlement to a monetary award.

After reviewing the evidence submitted by the tenant and having considered the submissions from the tenant herself and her advocate, I find the tenant has provided insufficient evidence demonstrating her right to a monetary award pursuant to section 67 of the *Act*. I found the tenant to have vacated the property without having given the landlord an adequate opportunity to address and rectify the issues as they related to noise from the upstairs tenants. The tenant was only in occupation of the home for approximately three weeks. This did not provide the landlord with a sufficient chance to effect change as requested by the tenant. For these reasons the tenant's application for a monetary award is dismissed.

Analysis – Landlord's Application

Section 7 of the *Act* explains, "If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... A landlord who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss."

This issue is expanded upon in *Residential Tenancy Policy Guideline #5* which explains, “Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect.”

As noted above, section 7 states that when a person breaches their tenancy agreement, they must compensate the other party for this breach. I accept the landlord’s testimony that *reasonable* efforts were to re-rent the unit as quickly as possible by posting it immediately on Craigslist and showing the unit three times prior to its re-rental. I will therefore award the landlord a monetary award of \$1,100.00 for the unpaid rent of November 2017.

The second portion of the landlord’s application concerns an award of \$1,100.00 for liquidated damages.

As part of their evidentiary package the landlord produced a copy of the tenancy agreement which shows at section 5 that the tenant agreed to a liquidated damages clause requires payment of \$1,100, “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 not vacate before the end of any fixed term the tenant will pay the sum of \$1,100.00 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 further rental revenue losses that will remain unliquidated.”

The landlord said she incurred expenses related to the re-renting of the suite and needed to schedule several visits to the property to ensure it was adequately prepared for the new, incoming tenants.

Residential Tenancy Policy Guideline #4 examines the issue of liquidated damages and notes, “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...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.” This *Guideline* notes that a liquidated damages clause will be found to be valid if; the sum demanded is not 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, or if a single lump sum is to be paid on occurrence of several events, some trivial some serious.

After examining the landlord's application and the events which led to a violation of section 7 of the *Act*, I find that the landlord is entitled to a monetary award of \$1,100.00. This amount is *not extravagant in comparison to the greatest loss that could follow a breach*, it is not an amount over and above the monthly rent, and it is not contingent on a series of several events. The tenant violated the *Act* and therefore must pay the damages which have stemmed from such a breach

The landlord is entitled to the entire amount of \$2,200.000 sought in their application for a monetary award.

~~As both parties were partially successful in their application, they must each bear the cost of their own filing fee.~~ **As the landlord was successful in her application, she may recover the \$100.00 filing fee from the tenant.**

Using the offsetting provisions contained in section 72 of the *Act*, the landlord may withhold the tenant's security deposit in its entirety, as partial satisfaction for a return of the filing fee.

Conclusion

I issue a monetary award to the landlord as follows:

ITEMS	AMOUNT
Unpaid rent for November	\$1,100.00
Liquidated Damages	1,100.00
Less Return of Security Deposit	(-1,100.00)
Less Return of Security Deposit	(-550.00)
Return of Filing Fee	100.00
TOTAL =	\$1,100.00 \$1,750.00

To give legal effect to the settlement agreed to by the parties and outlined above, I grant the ~~tenants a monetary order of \$1,100.00~~ **landlord a monetary award of \$1,750.00**. Should the tenant fail to comply with the order, the order may be filed in the Provincial Court of British Columbia 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, 2018

Residential Tenancy Branch

DECISION AMENDED PURSUANT TO SECTION 78(1)(A)
OF THE RESIDENTIAL TENANCY ACT ON December 4, 2018
AT THE PLACES INDICATED ON PAGES 3 & 6.