

DECISION

Dispute Codes MNSD MNDC FF

Introduction

This hearing dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, to keep the security deposit as partial satisfaction of his claim, and to recover the cost of the filing fee from the Tenants for this application.

Service of the hearing documents, by the Landlord's Agent to the Tenants, was done in accordance with section 89 of the *Act*, sent via registered mail on August 13, 2009 and March 20, 2009. Mail receipt numbers were provided in the tenant's verbal testimony. The landlord was deemed to be served the hearing documents on March 18, 2009, the fifth day after they were mailed as per section 90(a) of the *Act*.

Both the Landlord's Agent (Agent) and Male Tenant (Tenant) testified, gave affirmed testimony, were provided the opportunity to present their evidence orally, in writing, in documentary form, and to cross exam each other.

All of the testimony and documentary evidence was carefully considered.

Preliminary Issues

At the onset of the hearing I reviewed the evidence on file with both parties at which time the Tenant confirmed having received a copy of the written tenancy agreement and confirmed the letter he wrote to the Agent on August 7, 2009.

During the Tenant's testimony he stated that he never received copies of the Landlord's evidence proving that the Tenants agreed to pay the liquidated damages. I reviewed the Tenant's previous testimony with him and he confirmed a second time that he had previously received a copy of the Tenancy agreement and acknowledged that the liquidated damages clause was included in the tenancy agreement the Tenants signed.

In consideration of whether or not I would accept the Agent's documentary evidence I reviewed the Tenant's testimony confirming receipt of the tenancy agreement and the Tenant's acknowledgement of the liquidated damages clause contained in the tenancy agreement, after which I determined that the evidence is relevant. I find that my

acceptance of this evidence would not prejudice the other party or constitute a breach of the principles of natural justice as the Tenant has confirmed having previously received this evidence and acknowledged the content of the agreement. I hereby accept the Agent's evidence and will consider it in my decision, in accordance with #11.5 of the Residential Tenancy Branch Rules of Procedure.

Issues(s) to be Decided

Is the Landlord entitled to a Monetary Order under sections 67 and 72 of the *Residential Tenancy Act*?

Background and Evidence

The undisputed facts are that the month to month tenancy agreement was effective December 1, 2008, however the Tenants were entitled to move into the rental unit on November 16, 2008 at the cost of one half month's rent. The written tenancy agreement was for a fixed term set to expire on November 30, 2009 however the Tenant's provided the Landlord with written notice on June 30, 2009 to end the tenancy effective July 31, 2009. Rent was payable on the first of each month in the amount of \$950.00 and a security deposit of \$475.00 was paid on October 30, 2008.

The Agent testified that the Landlord is seeking the full \$950.00 liquidated damages as listed in the tenancy agreement, that the rental unit was re-rented as of August 1, 2009, and that the Landlord suffered a loss of \$498.75 (\$475.00 + GST) for a leasing fee which was payable to the Agent for costs to re-rent the unit. The Agent confirmed that they are seeking the security deposit in partial satisfaction of their claim.

The Tenant testified that they were forced to break the lease because the living conditions were unbearable and they needed to move out. The Tenant argued that they stayed in the rental unit for 8 ½ months and he feels the Landlord's claim should be prorated to be 1/3 of the Landlord's actual costs.

The Tenant argued that there is no provision in his tenancy agreement whereby the Landlord could retain the security deposit as a penalty or payment towards the liquidated damages.

Analysis

I find that in order to justify payment of damages under sections 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply with

the *Act* and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7. It is important to note that in a claim for damage or loss under the *Act*, the party claiming the damage or loss, in this case the Landlord, bears the burden of proof and the evidence furnished by the Applicant Landlord must satisfy each component of the test below:

Test For Damage and Loss Claims

1. Proof that the damage or loss exists
2. Proof that this damage or loss happened solely because of the actions or neglect of the Respondent in violation of the *Act* or agreement
3. Verification of the Actual amount required to compensate for loss or to rectify the damage
4. Proof that the claimant followed section 7(2) of the *Act* by doing whatever is reasonable to minimize the damage or loss

In regards to the Landlord's right to claim damages from the Tenants, Section 7 of the *Act* states that if the landlord or tenant does not comply with this *Act*, the non-complying landlord or tenant must compensate the other for damage or loss that results. Section 67 of the *Act* grants a Dispute Resolution Officer the authority to determine the amount and to order payment under these circumstances.

Based on the undisputed facts the Tenants provided the Landlord with written notice to cancel a fixed term tenancy, prior to the expiration date of the fixed term, in contravention of section 45 of the *Act* which provides that a tenant can end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

When entering into a written tenancy agreement with a liquidated damage clause, the amount listed as the liquidated damage amount must be a genuine pre-estimate of the potential loss that would be incurred if the lease is broken prior to the expiry date; otherwise the clause may be held to constitute a penalty and as a result will be unenforceable.

In this case it is predetermined that the Landlord incurs a fee, payable to his leasing agent, in the amount of one half of one month's rent plus GST, so the genuine pre-estimate for the liquidated damages should reflect an amount based on this formula. The predetermined amount of loss in this case is for a total of \$498.75 and yet the liquidated damages were listed on the tenancy agreement as \$950.00. Based on the aforementioned I hereby find the liquidated damages clause to be unenforceable in accordance with #4 of the Residential Tenancy Policy Guidelines.

Although I have found the liquidated damages clause to be unenforceable, I have found that the Landlord has suffered a loss in the amount of \$498.75 and that this loss is a direct result of the Tenants' contravention of section 45 of the Act in ending the fixed term tenancy early. Based on the aforementioned I hereby approve the Landlord's claim in the amount of \$498.75.

I find that the Landlord has been partially successful with his claim and is therefore entitled to recover the \$50.00 filing fee from the Tenants.

Monetary Order – I find that the Landlord is entitled to a monetary claim, that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security deposit, and that the Landlord is entitled to recover the filing fee from the Tenants as follows:

Loss suffered to re-rent the rental unit	\$498.75
Filing fee	<u>50.00</u>
Subtotal (Monetary Order in favor of the landlord)	\$548.75
Less Security Deposit of \$475.00 plus interest of \$1.23	-476.23
TOTAL OFF-SET AMOUNT DUE TO THE LANDLORD	\$72.52

Conclusion

I HEREBY FIND in favor of the Landlord's monetary claim. A copy of the Landlord's decision will be accompanied by a Monetary Order for \$72.52. The order must be served on the respondent Tenants and is enforceable through the Provincial Court 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: December 04, 2009.

Dispute Resolution Officer