

DECISION

Dispute Codes MNSD, MNDC, FF, O

Introduction

A substantial amount of documentary evidence and written arguments has been submitted by the parties prior to the hearing. I have thoroughly reviewed all submissions.

I also gave the parties the opportunity to give their evidence orally and the parties were given the opportunity to ask questions of the other parties .

All testimony was taken under affirmation.

Issues(s) to be Decided

This decision deals with two applications for dispute resolution, one brought by the tenant and one brought by the landlords. Both files were heard together.

The tenant's application is a request for return of double the security deposit of \$1065.00 for a total of \$2130.00 less \$190.00 which the tenants have agreed to allow the landlord to keep for newspaper advertisements, bringing the claim to \$1940.00. The tenants are also requesting that the landlord bear the \$50.00 cost of the filing fee that they paid for their application for dispute resolution.

The landlords claim is a request for a monetary order for \$6,514.01 and a request for the landlord be allowed to retain the full security deposit plus interest towards this claim. The landlord is also requesting that the tenants bear the \$100.00 cost of the filing fee that he paid for his application for dispute resolution

Background and Evidence

The tenant testified that:

- They had given notice that they would be vacating the rental unit two months before the end of the lease.
- Because they were breaking the lease they had informed the landlord, in an e-mail, that he could keep what remained of their damage deposit minus \$775.00 for the downstairs tenants portion (as there sub-tenants were not vacating and had signed a tenancy agreement with the landlord), to cover any losses incurred by the landlord as a result of their breaking the lease.
- The landlord had however managed to re-rent the unit right away for more rent than they were paying, and therefore he lost no rent.
- The only costs the landlord did incur were some advertising costs, totalling approximately \$190.00.

The tenants therefore believe that the landlord should have returned their portion of the security deposit, which totalled \$1065.00, and since he did not return that amount within the 15 day time limit they believe he should pay double for a total of \$2130.00 less the advertising costs of \$190.00.

The landlord testified that:

- The tenants rented the full House and rent was set at \$3680.00.
- The tenants paid a security deposit of \$1840.00.
- The tenants had signed a tenancy agreement which has two liquidated damages clause is as follows:
 1. "The tenant shall have the option of terminating a fixed term of the tenancy before the expiry date, upon payment to the landlord of the equivalent of one month rent, not as a penalty, but as liquidated damages."
 2. "Security deposit of \$1840.00 will be given by the tenant's to landlord upon the Residential Tenancy Agreement is signed or as arranged, and not refundable before expiry date of the lease as liquidated

damages” (note: the tenancy agreement further states beside the security deposit clause” no refund without full payment of 12 month rent”.

- He purposely made the liquidated damages amounts high to act as a deterrent to the tenants so that they would not breach the tenancy agreement.
- He therefore believes that since the tenants broke the lease they must pay the equivalent of one month rent (\$3680.00) as stated in the first liquidated damages clause.
- He also believes that since the tenants did not stay for the full 12 months they must also allow him to keep the full security deposit of \$1840.00 as stated in the second liquidated damages clause.
- He has also had advertising costs \$189.01 to try and re-rent the unit after the tenants broke the lease.
- One of the tenant’s cheques was also not honoured by the bank and therefore according to the tenancy agreement they must pay an NSF fee of \$30.00.
- He has not lost any rent as the rental unit has now rented out for more than these tenants were paying, however it was a big inconvenience for him, having to interviewed new tenants and show the rental unit prior to the end of the lease.
- Because the tenants lose their full security deposit for not staying the full 12 months, they must also supply a security deposit of \$775.00 for the downstairs tenants who are staying.

The landlord is therefore requesting an order as follows:

Security deposit for downstairs tenants	\$775.00
The equivalent of one month rent as liquidated damages	\$3680.00
Newspaper advertising costs	\$189.01
NSF cheque fee	\$30.00
Filing fee	\$100.00

Total	\$6614.01
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Analysis

Whether or not the tenants have a right to return of the security deposit is directly related to the outcome of the landlords application, and therefore I will deal with the landlords application first.

It is my decision that the landlords liquidated damages clauses are not enforceable. First of all it is not reasonable for a landlord to have two liquidated damages clauses in one contract as it makes the contract very ambiguous and secondly a liquidated damages clause will not be enforced if its purpose is to punish the wrongdoer/party in breach rather than to compensate the injured party, and although, at least one of, the liquidated damages clauses states that it is not a penalty, it is my finding that in this contract it is a penalty.

In order for a liquidated damages clause to be upheld, two conditions must be met. First, the amount of the damages identified must roughly approximate the damages likely to fall upon the party seeking the benefit of the term. Second, the damages must be sufficiently uncertain at the time the contract is made that such a clause will likely save both parties the future difficulty of estimating damages.

In this case it is my finding that the liquidated damages amounts do not roughly approximate the damages likely to result from a breach of this tenancy agreement, and in fact the landlord stated that he purposely set the amounts high as a deterrent. If I were to enforce such a high amount of total liquidated damages (\$5,520.00) it would definitely be a penalty and not a reasonable pre-estimate of the likely costs of the breach, it would and would result in an unjust enrichment of the landlord.

The landlord has not lost any rent in this case, as the unit was rented right away and the overall rent he has collecting exceeds the amount of rent he had been collecting during this lease.

Therefore it is my decision that I deny both the landlords \$3680.00, and the \$1840.00 liquidated damages claims.

I will allow the claim for the NSF bank fee; however only to a maximum of \$25.00 as that is the maximum amount allowed under the Residential Tenancy Act.

The tenant has already agreed to allow the landlord to keep \$775.00 as a security deposit for the downstairs subtenants, and therefore I need make no order in favor of the landlord for this amount.

The tenant has also agreed to allow the landlord to keep \$190.00 for advertising costs, and therefore I need make no order in favor of the landlord for advertising costs.

I deny the landlords request for the \$100.00 filing fee, as I have not allow the majority of the landlords claim.

The total amount of the landlord's claim that I have allowed is \$25.00.

Therefore in the tenants application, since I have not allow the landlord to keep the security deposit as liquidated damages, I will allow the tenants request for the return of

\$1065.00 of the deposit, less the \$190.00 the tenant has agreed to pay for advertising costs leaving a balance of \$875.00.

I also allow the tenants claim for the \$50.00 filing fee that they paid for dispute resolution.

I will not order that the landlord pay double the amount of security deposit however because the tenants e-mail did indicate to the landlord that he could retain the security deposit to cover his costs, and since the landlord believed that he had the right to the liquidated damages, he had held that money in good faith.

Conclusion

I have set off the \$25.00 that I allowed in the landlords claim, against the \$925.00 I have allowed in the tenants claim, and I have issued an order for the landlord to pay \$900.00 to the tenant.

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: July 06, 2010.

Dispute Resolution Officer