

DECISION

Dispute Codes MNSD, MNDC

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- a monetary order for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67.

Both parties attended the hearing and were given a full opportunity to be heard, to present evidence and to make submissions. The landlord and the tenant testified that the landlord handed the tenant a copy of his application for dispute resolution on June 24, 2010. I am satisfied that the landlord served the tenant with a copy of the application for dispute resolution in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for liquidated damages due to the tenant's premature end to this tenancy prior to the expiration of her fixed term tenancy agreement? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award he is seeking?

Background and Evidence

The tenant moved into these premises on or about April 27, 2006. The most recent fixed term tenancy agreement for this tenancy covered the period from November 1, 2009 until October 31, 2010. The tenant vacated the rental unit on June 29, 2010, after providing notice to the landlord on May 27, 2010 that she needed to end her tenancy by the end of June 2010. She did so because she was encountering problems climbing flights of stairs to reach her rental unit while she was pregnant.

The tenant provided the landlord with written notice of her forwarding address on June 14, 2010. The parties entered undisputed testimony that the landlord mitigated the tenant's responsibility for loss that the tenant might incur during the remainder of the tenancy by advertising and re-renting the rental unit to another tenant for July 2010. The landlord made no application for lost rent after the tenant vacated the rental unit.

The landlord applied for \$855.00 in liquidated damages for the tenant's premature ending of this tenancy. He cited Section 5 of the most recent residential tenancy agreement (and all previous such agreements). This provision allowed the landlord to retain a payment equivalent to one month's rent for liquidated damages to cover the administration costs of re-renting the rental unit before the scheduled expiration of the tenancy agreement. He asked for authorization to retain her security deposit in partial satisfaction of this request for a monetary award.

The tenant asked that her special circumstances in ending this tenancy due to health problems associated with her pregnancy be factored into a decision regarding the landlord's application. She also submitted that she did not damage the rental premises. She testified that the landlord's actual costs associated with re-renting the rental unit did not likely approximate the \$855.00 liquidated damages charge he was seeking.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, a Dispute Resolution Officer (DRO) 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* or the tenancy agreement, 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 tenancy agreement or a contravention of the *Act* or the tenancy agreement, on the part of the other party. Residential Tenancy Policy Guideline #4 establishes how clauses for Liquidated Damages in residential tenancy agreements are to be interpreted by DROs.

...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...

*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...*
(Emphasis added from original)

The landlord presented considerable oral and written evidence to support his assertion that the liquidated damages clause represented a realistic and genuine pre-estimate of the losses that he would normally expect to incur if the tenant ended this fixed term tenancy prematurely. Although as it turned out the landlord was able to re-rent the rental unit relatively quickly, the evidence indicates that he was concerned that he would be able to do so in mid-summer. He provided considerable evidence regarding the rental market in his community and the length of time it was taking for landlords to place successful advertisements in the local newspaper used by landlords in his community. He also provided written evidence regarding the costs he incurred in re-renting premises, which he maintained supported his claim that the liquidated damages fee was a realistic and genuine one.

After considering all of the written and oral evidence presented, I find that the landlord has demonstrated that the amount agreed to in the liquidated damages clause is a genuine pre-estimate of the loss that the landlord might expect to incur if the tenant breached the agreement. This provision was included in successive residential tenancy agreements signed by the tenant during the course of her tenancy. As outlined in the

above-noted portion of the relevant Residential Tenancy Policy Guideline #4, the tenant must pay the stipulated amount, even though in this case the landlord may not have incurred this amount of actual loss or damages.

I find that the landlord is entitled to a monetary award of \$855.00 for liquidated damages, equivalent to one month's rent, as set out in the most recent residential tenancy agreement. I authorize the landlord to retain the tenant's security deposit (i.e., \$379.61) plus applicable interest in partial satisfaction of this award. No interest is payable over this period.

Conclusion

I grant a monetary Order in the landlord's favour in the amount of \$475.39 (i.e., \$855.00 - \$379.61 = \$475.39). The landlord will bear his costs of filing this application.

The landlord is provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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*.