



# Dispute Resolution Services

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Residential Tenancy Branch  
Ministry of Public Safety and Solicitor General

## **DECISION**

Dispute Codes      MND MNR 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, regulation or tenancy agreement, loss of rent, to retain the security deposit in partial satisfaction of the debt and to recover the cost of the filing fee from the tenant for this application.

### **Issue(s) to be Decided**

The issues to be determined based on the testimony and the evidence is whether or not the landlord is entitled to monetary compensation for damages and loss of rent.

### **Background and Evidence**

The tenancy began on January 1, 2010 for a fixed term that was to expire on December 31, 2010. The tenancy was ended by the tenant on October 12, 2010. The monthly rent was \$1,195.00 and a security deposit of \$597.50 was paid.

The landlord submitted into evidence a copy of the tenancy agreement, a copy of a summary of charges, a copy of the signed move-in and move-out condition inspection report and confirmation of advertisements for the vacant suite. Also in evidence was a copy of a document titled "*Agreement*" that indicated the tenant would permit deductions from the security deposit of \$72.80 for carpet cleaning, \$300.00 for liquidated damages and \$200.00 to pay back the move out allowance for total deduction of \$572.80 with an indication that the tenant did not agree with the loss of rent charges. The tenant confirmed that the landlord's evidence was received.

The landlord testified that the tenant had agreed to the above deductions from the security deposit. However because the tenant had terminated the tenancy agreement prior to the fixed term and the unit was vacant for one month, the landlord incurred a loss of \$1,197.00 for the month of November 2010. The landlord testified that the damages were mitigated by successfully re-renting the unit for the month of December

2010 and the landlord supplied proof of the advertisements released during September and October 2010. The landlord was claiming the \$572.80 agreed-to by the tenant plus the \$1,197.00 loss of rent and the filing fee for a total of \$1,817.80.

The tenant acknowledged that she had ended the tenancy before the fixed term expired and that she did agree to the deductions specified in the agreement she had signed. The tenant pointed out that she had indicated on the landlord's form that she disagreed with a possible claim for loss of rent. The tenant stated that the tenancy agreement that was signed permitted the tenant to end the tenancy agreement prior to its expiry date if she gave notice and paid the \$300.00 liquidated damages. The tenant stated that she based this position on the tenancy agreement which contained the provision below at paragraph 3 a) i) of the agreement:

*"To terminate this lease prior to the expiry date on the 31 day of 12, 2010, the tenant will be required to give notice to end their tenancy as provided for in section 12 herein."*

***In addition the tenant is required to pay \$300.00 as liquidated damages to cover administration costs – this is not a penalty"***

(reproduced as written including emphasis)

The tenant stated that the agreement clearly allows a tenant the option of giving notice "prior to the expiry date" and to pay the liquidated damages in compensation for ending the tenancy. The tenant pointed out that the agreement makes no mention that the landlord would be entitled to hold the tenant responsible for further damages, such as loss of rent.

### **Analysis**

Section 7(1) of the Act provides that if a landlord or tenant does not comply with this Act, the Regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for the damage or loss which results. Section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation for damages has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and

2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Section 58 of the Act states dispute resolution may be pursued in relation to the rights, obligations and prohibitions under the Act, or the rights and obligations under the terms of a tenancy agreement. In this instance, I find that the dispute before me relates specifically to terms of the tenancy agreement signed by both parties and I find that the damages being claimed by the landlord related to the tenant's alleged failure to fulfill the fixed term to its completion in violation of the agreement.

When a tenant and a landlord sign a fixed term tenancy contract, both are bound to the tenancy terms including the obligation to continue the agreement to its expiry date, failing which the party responsible for prematurely ending the tenancy would be in violation of the agreement and therefore liable for any losses that flow from this. I find that, whether expressly-stated or not, this term is implicit in any fixed-term contract.

I find that the contract before me also contains a provision that appears to give the tenant an option to end the agreement before its expiry by paying \$300.00 liquidated damages as excerpted below:

*"To terminate this lease prior to the expiry date on the 31 day of 12, 2010, the tenant will be required to give notice to end their tenancy as provided for in section 12 herein."*

I find that section 12 of the agreement referenced above, (section 12, "ENDING THE TENANCY"), consists of 6 paragraphs, each containing terms about how, and under what circumstances, the landlord or tenant may validly terminate the tenancy agreement. Despite the reference made to section 12, I find that not one of the 6 paragraphs in section 12 actually relates to the situation where a tenant is attempting to give notice to terminate a *fixed term* tenancy prior to its expiry date.

It is not clear why section 3 a) i) in the agreement makes reference to section 12 and the landlord did not sufficiently clarify the wording in relation to the purpose of this term in the agreement.

I find that the tenant may have interpreted, (or misinterpreted), the ambiguous wording in the contract to mean that, by paying the \$300.00 liquidated damages, and giving adequate notice, the tenant's liability would be limited to the amount stated in section 3(a)(i) of the agreement.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if ; (a) the term is inconsistent with this Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

With respect to the landlord's argument that the tenant had given written permission agreeing that the landlord could keep the deposit, I find that in order to validly rely on the tenant's signature on the landlord's form titled, "*Agreement*". It must include the tenant's consent to all of the terms set out on that form and the document must also be signed by both the tenant and the landlord to constitute an enforceable agreement. In this instance, the tenant clearly indicated that, while she would agree that the landlord could retain \$300.00 for liquidated damages, the \$200.00 for the "move-in allowance" and the \$72.80 for carpet cleaning costs from her security deposit, she would not agree to pay the landlord for the loss of rent of \$1,195.00. The landlord did not sign its consent to waive the loss of rent costs shown on the form and it follows that there was no meeting of the minds on this subject and therefore no valid nor enforceable agreement completed between the parties with regard to retaining the deposit to pay for the stated costs.

In light of the unclear term in the contract relating to the triggering of the liquidated damages, I find that this provision in the agreement cannot be enforced and based on section 6(3)(c) of the Act, I dismiss the landlord's claim for the \$300.00 liquidated damages.

With regard to the \$200.00 charge for the return of a move-in bonus given to the tenant at the start of the tenancy by the landlord, I find that there is no provision in the Act or Regulation that permits a landlord to rescind funds already credited or to require repayment of a discount, based on the tenant meeting certain residency criteria. I find that the monetary credit, once gifted to the tenant do not constitute funds being held in trust for the landlord, pursuant to any section of the Act or Regulation. Nor would the tenant's failure to refund the credit constitute damages under section 67 of the Act. Accordingly, I find that the landlord's claim for \$200.00 to compensate for granting the move-in bonus must be dismissed.

With regard to the \$72.80 cost of carpet-cleaning, I find that the landlord did not submit any invoices or receipts to verify that this expenditure was incurred. Accordingly I find that element 3 of the test for damages was not sufficiently met.

With respect to the tenant's argument disputing the merits of the landlord's claim for the \$1,195.00 loss of rent for the month of December, I do not accept the tenant's position

that, had she not been influenced by the apparent limiting of liability by the liquidated damages clause in the contract, she would not have proceeded to terminate the contract prematurely. I find that the tenant signed a tenancy agreement with an inherent obligation to remain as a tenant until the fixed term expired. Moreover, the landlord gave clear intention at the end of the tenancy that any loss of rent would be pursued. I find that this portion of the landlord's claim meets all elements in the test for damages and the landlord is entitled to be reimbursed \$1,195.00 by the tenant.

I find that the landlord has established a total monetary claim of \$1,245.00 comprised of \$1,195.00 loss of rent and the \$50.00 fee paid by the landlord for this application. I order that the landlord retain the security deposit of \$597.50 in partial satisfaction of the claim leaving a balance due of \$647.50 in favour of the landlord.

### **Conclusion**

I hereby grant the Landlord an order under section 67 for \$647.50. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) 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: February 2011.

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Residential Tenancy Branch