

## **DECISION**

Dispute Codes      OPC, OPB, MND, MNSD, MNDC, O, FF

### Introduction

This hearing dealt with the landlord's Application for Dispute Resolution seeking an order of possession and a monetary order.

The hearing was conducted via teleconference and was attended by two agents for the landlord and both tenants

The parties agree that the tenant vacated the rental unit on February 1, 2011 and as such the landlord no longer requires an order of possession. I therefore amend the landlord's Application to exclude any matters related to possession of the rental unit.

### Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for unpaid rent; for painting; liquidated damages; for all or part of the security deposit and to recover the filing fee from the tenant for the cost of the Application for Dispute Resolution, pursuant to Sections 37, 38, 67, and 72 of the *Residential Tenancy Act (Act)*.

### Background and Evidence

The landlord submitted a copy of a tenancy agreement and addendum signed by the parties on September 20, 2010 for a 12 month fixed term tenancy beginning on September 20, 2010 for a monthly rent of \$1,450.00 due on the 1<sup>st</sup> of each month with a security deposit of \$725.00 paid and a pet damage deposit of \$725.00 paid.

The tenancy ended when the tenant vacated the rental unit on February 1, 2011. The pet damage deposit was returned to the tenant on February 11, 2011 during the move out inspection.

The addendum signed by the tenant on September 20, 2010 lists, among other things, that the building is a non smoking building and the tenant agrees not to smoke in the rental unit. The tenant submits that the landlord did not inform the tenant that the residential property was a smoke free building until after they had entered into a verbal tenancy agreement in mid September 2010 and after they moved into the rental unit on September 20, 2010 when they signed the written tenancy agreement and addendum.

The landlord confirmed that the advertisements posted on the front door of the residential property, as per the evidence submitted by the tenants, are accurate and they contain no indication that the building or rental unit is non-smoking.

The landlord testified that he cannot be certain if he discussed with the tenants when they first viewed the rental unit the issue of smoking but he did state that the tenants were aware that the previous tenant was evicted, in part, because he was smoking in the rental unit. The tenants testified they did not know this until after they had moved in.

The addendum has another clause that speaks to early termination. It reads: "If the Tenant ends the tenancy before the expiration of the original term, the Tenant agrees to pay to the Landlord the sum equal to one (1) month's rent and forfeits the security deposit as liquidated damages and not as a penalty to cover the administration cost of re-renting premises." In the landlord's Application for Dispute Resolution he refers to these sums as "broken lease \$725.00, penalty broken lease \$1,450.00."

The parties agreed that during the tenancy the tenants, in October 2010, after the landlord had discussed with them complaints from other tenants about smoking, offered to end the tenancy early if this was such a concern but that the landlord stated they could do that but they would forfeit their security deposit, so the tenants did not end the tenancy at this early stage of the tenancy.

The landlord submitted into evidence a copy of a 1 Month Notice to End Tenancy for Cause dated January 13, 2011 with an effective vacancy date of February 16, 2011 citing a number of different causes to end the tenancy. The landlord states in his Application that the tenant moved out on February 1, 2011 without providing a written notice.

The tenants contend that they had provided the landlord with emails, submitted into evidence, outlining their plans to leave by February 1, 2011 and providing their forwarding address prior to February 1, 2011. The landlord acknowledged, in the hearing, that he had received this correspondence.

The tenant submits that the landlord did not inform the tenant that the residential property was a smoke free building until after they had entered into a verbal tenancy agreement in mid September 2010 and after they moved into the rental unit on September 20, 2010 when they signed the written tenancy agreement and addendum.

### Analysis

Section 26 of the *Act* requires a tenant to pay rent when rent is due under the tenancy agreement despite any issues between the parties. As the landlord issued a 1 Month Notice to End Tenancy on January 13, 2011 and despite the effective date on the Notice (February 16, 2011) the earliest the tenancy could end was February 28, 2011.

Regardless of the fact that the tenants vacated the rental unit prior to February 28, 2011 the tenancy was still in force for that month and I find the tenants are responsible for the rent for the full month of February 2011.

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.

The liquidated damages clause in this agreement requires the tenants to pay the landlord, should the *tenants* end the tenancy, one full month's rent plus forfeiture of their security deposit. There is nothing in the clause that specifies the tenants are responsible for liquidated damages if the landlord ends the tenancy for a breach of the tenancy agreement.

As the landlord was unable to outline how the amount of liquidated damages was determined I find that the amount determined is not a pre-estimate of any loss. In addition, I find that the amount determined by the landlord constitutes a penalty as opposed to a reflection of administrative costs resulting from the tenant ending a tenancy. And finally, the tenants did not end the tenancy; the landlord did and as the agreement is silent on that matter, I find the landlord has failed to establish entitlement to liquidated damages. I dismiss this portion of the landlord's application.

To be successful in a claim for compensation for damages or loss the party making the claim must provide sufficient evidence to substantiate the following four points:

1. That a loss or damage exists;
2. That this loss or damage results from a violation of the Act, regulation or tenancy agreement;
3. The value of that loss or damage; and
4. The steps taken, if any, to mitigate and loss or damages.

In the case of verbal evidence/testimony, I find that where the verbal evidence/testimony is clear and both the landlord and tenant agree on the interpretation, there is no reason why such evidence cannot provide some value to the resolution of a dispute. However when the parties disagree with what was agreed-upon, the verbal evidence/testimony, by its nature, is virtually impossible for a third party to interpret when trying to resolve disputes.

Having said this, based on the evidence before me and the balance of probabilities, I find it very likely that the tenants did not know when they agree to rent the rental unit that it was a non-smoking building. However, the tenants did sign the addendum to the tenancy agreement agreeing to those terms, as such I find the tenants are responsible for any remediation required to the rental unit.

I accept the landlord had an opportunity to mitigate his losses by mutually agreeing to end the tenancy without penalty as soon as the tenants put the offer forward in the first full month of the tenancy but the landlord, by insisting the tenants would lose their security deposit for ending the tenancy early failed to mitigate any losses.

As this offer was made by the tenants so early in the tenancy I find it unlikely that the landlord would have had to paint the rental unit to eliminate any smoking odours. As such, I find the landlord failed to mitigate any losses in accordance with Section 7(2) of the *Act* and I dismiss this portion of the landlord's Application.

### Conclusion

I find that the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$1,500.00** comprised of \$1,450.00 rent owed and the \$50.00 fee paid by the landlord for this application.

I order the landlord may deduct the security deposit and interest held in the amount of \$725.00 in partial satisfaction of this claim. I grant a monetary order in the amount of **\$775.00**. This order must be served on the tenants 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: March 11, 2011.

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Residential Tenancy Branch