

## **Decision**

**Dispute Codes:** MNR, MNDC, FF

### **Introduction**

This hearing dealt with an application by one of the landlords for a monetary order as compensation for unpaid rent or utilities / compensation for damage or loss under the Act, regulation or tenancy agreement / and recovery of the filing fee. Both parties participated in the hearing and gave affirmed testimony.

### **Issues to be decided**

- Whether the landlords are entitled to any or all of the above under the Act, regulation or tenancy agreement

### **Background and Evidence**

Pursuant to a written tenancy agreement, the fixed term of tenancy was from March 1, 2009 to February 28, 2010. Monthly rent was \$1,650.00 and a security deposit of \$825.00 was collected. While a copy is not before me in evidence, the parties agree that a move-in condition inspection and report were completed.

Following verbal notice to the landlords, the tenants vacated the unit on December 15, 2009. Rent was paid up to the end of December 2010. It is not clear on which date notice was provided. While a copy is not before me in evidence, the parties agree that a move-out condition inspection and report were completed. It is understood that the forwarding address provided by the tenants on the move-out condition inspection report is tenant "ML's" work place. It is also understood that the tenants gave verbal consent to the landlords to retain the full security deposit.

In the application, the landlords seek to recover compensation as follows:

\$1,650.00: loss of rental income for January 2010

\$1,650.00: loss of rental income for February 2010

\$1,039.00: management "placement fee"

\$150.00: tracing fee for determining tenants' residential mailing address

\$50.00: filing fee

Reference to the “placement fee” is found in clause 3.0 of the tenancy agreement, which reads as follows:

3.0 That in the event of an early termination, the Lessee acknowledges and agrees that pursuant to this Lease, Lessee is responsible for the monthly rental fee until such time as the property has been re-rented by the Lessor to a qualified and suitable tenant and a written lease agreement with such party has been entered into;

The Lessee further agrees that Lessee shall pay the placement fee charged by [name of property management company] which is sixty (60%) percent of the current monthly rate. This amount is due and payable at such time that Lessee submits written request of early termination to Lessor as described in Section 7 “Notices” of this Lease.

The landlords testified that they paid a placement fee of \$1,039.00 to the property management company for recruiting the subject tenants. The agent representing the property management company was not present at the hearing to testify and made no written submissions.

Pursuant to strata council requirements, following the end of tenancy, the landlords had the option of either moving into the unit or to sell it. The landlords testified that they had no intention of moving into the unit and had planned to sell it after the fixed term of tenancy ended. Following the early end of tenancy, the landlords’ recollection is that they listed the unit for sale in January 2010 and sold it later that same month. It is understood that the date of occupancy was on or about February 26, 2010.

For reasons related to personal safety, the tenants testified that police instructed them not to provide their residential address to persons outside of their immediate circle of family and friends. As the landlords had only tenant “ML’s” work address, they hired a professional tracing firm to find the tenants’ residential address. This address was used by the landlords to serve the application for dispute resolution and notice of hearing.

### **Analysis**

The full text of the Act, Regulation, Residential Tenancy Policy Guidelines, Fact Sheets, forms and more can be accessed via the website: [www.rto.gov.bc.ca/](http://www.rto.gov.bc.ca/)

Section 5 of the Act provides that **This Act cannot be avoided**, and provides:

5(1) Landlords and tenants may not avoid or contract out of this Act or the regulations.

(2) Any attempt to avoid or contract out of this Act or the regulations is of no effect.

Section 45 of the Act addresses **Tenant's notice**, and provides in part as follows:

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

Section 52 of the Act speaks to **Form and content of notice to end tenancy**, and provides as follows:

52 In order to be effective, a notice to end a tenancy must be in writing and must

- (a) be signed and dated by the landlord or tenant giving the notice,
- (b) give the address of the rental unit,
- (c) state the effective date of the notice,
- (d) except for a notice under section 45(1) or (2) [*tenant's notice*], state the grounds for ending the tenancy, and
- (e) when given by a landlord, be in the approved form.

Section 7 of the Act speaks to **Liability for not complying with this Act or a tenancy agreement**, and provides as follows:

7(1) 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 damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Based on the documentary evidence and testimony of the parties, I find there is no evidence that the tenants provided written notice to end tenancy. In this regard, there was a breach of the Act. It also appears there was a breach of clause 7 (NOTICES) in the tenancy agreement, which stipulates in part that “Any notices to be given pursuant to this Lease shall be given in writing...” Further, there is no evidence that the tenants provided the landlords with notice to end the tenancy effective on a date that “is not earlier than one month after the date the landlord receives the notice.” Additionally, clause 3.0 of the tenancy agreement provides that in the event of an early termination, the tenants are responsible for “the monthly rental fee” until the unit has been re-rented and a written lease has been entered into. Following from the above, and based on the documentary evidence and testimony of the parties, I find that the landlords have established entitlement to loss of rental income for January 2010 of **\$1,650.00\***.

In the circumstances of this dispute, it is clear why the landlords did not undertake to mitigate their loss by advertising for new renters following the early end of tenancy. As previously noted, the landlords did not plan to move into the unit themselves, and the requirement imposed by strata council was that the only other option available to them was to sell. In sum, I find that the landlords have not established entitlement to loss of rental income for February 2010.

In regard to the “placement fee,” in the absence of any testimony or documentary evidence from the agent representing the property management company, I find that it is a “liquidated damages” provision. In this regard, Residential Tenancy Policy Guideline # 4 speaks to “Liquidated Damages,” in part as follows:

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, a dispute resolution officer will consider the circumstances at the time the contract was entered into.

While the landlords have claimed the full amount of the placement fee of \$1,039.00, the tenancy agreement provides that it shall be limited to 60% of “the current monthly rate,” which I interpret to mean 60% of the monthly rent. In the result, I find that the landlords have established entitlement to **\$990.00\*** (\$1,650.00 x 60%).

As to the \$150.00 tracing fee, the landlords knew the mailing address of tenant “ML’s” workplace, and had the option of paying a \$50.00 filing fee to apply for “substituted

service.” In this regard, section 71 of the Act addresses **Director’s orders: delivery and service of documents**, and provides in part that “The director may order that a notice, order, process or other document may be served by substituted service in accordance with the order.” Such an application may be made in circumstances where the hearing package and related documentation cannot be served pursuant to the provisions in section 89 of the Act (**Special rules for certain documents**). In short, I find that the landlords have established entitlement limited to **\$50.00\***.

As the landlords have achieved a measure of success with their application, I find they are entitled to recover the **\$50.00\*** filing fee.

I find the total entitlement established by the landlords is **\$2,740.00** (\$1,650.00 + \$990.00 + \$50.00 + \$50.00). It is understood that when the tenants gave verbal consent to the landlords to retain the security deposit, the intention was that this would be applied against the amount owed for the placement fee. But even if I am incorrect on this point, I hereby order that the landlords retain the security deposit of \$825.00, and I hereby issue a **monetary order** in favour of the landlords for the balance owed of **\$1,915.00** (\$2,740.00 - \$825.00).

### **Conclusion**

Pursuant to section 67 of the Act, I hereby issue a **monetary order** in favour of the applicant landlord in the amount of **\$1,915.00**. Should it be necessary, this order may be served on the tenants, filed in the Small Claims Court 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*.

**DATE: March 3, 2011**

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Residential Tenancy Branch