



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, FF

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for unpaid rent / loss of revenue - Section 67;
2. An Order to retain the security deposit - Section 38; and
3. An Order to recover the filing fee for this application - Section 72.

I accept the Landlord’s evidence that the Tenant was served with the application for dispute resolution and notice of hearing by registered mail in accordance with Section 89 of the Act. The Tenant did not participate in the conference call hearing.

The Landlord was given full opportunity to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The Tenant entered into a one-year lease agreement for the period February 1, 2011 to January 31, 2012. Rent in the amount of \$1,370.00 was payable in advance on the first day of each month. On January 17, 2011, the Landlord collected a security deposit from the Tenant in the amount of \$685.00. On February 1, 2011, the Tenant called the Landlord to advise that she would not be moving into the unit as she had purchased a home. The Tenant informed the Landlord that the Landlord could keep the security

deposit amount of \$685.00 and did not pay rent for February 2011. The Landlord immediately commenced advertisements to obtain new tenants and new tenants were in the unit on June 1, 2011. The Landlord waited until the Tenant's security deposit cheque had cleared before making the application for dispute resolution.

In addition to a claim for the unpaid February rent, the Landlord claims loss of rental income for March 2011 and liquidated damages in the amount of \$685.00. The lease agreement contains a term in relation to liquidated damages as follows:

If the tenant ends the fixed term tenancy before the end of the original term as set out, the landlord may, at the landlord's option, treat this Agreement as being at an end. In such event, the sum of \$685.00 will be paid by the tenant to the Landlord as liquidated damages, and not as a penalty, to cover the administrative costs of re-renting the rental unit. The landlord and tenant acknowledge and agree that the payment of liquidated damages will not preclude the Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damage to the rental unit or residential property and damages as a result of lost rental income due to the tenant's breach of any term of this Agreement.

Analysis

The tenancy agreement is a contract of adhesion drawn by the landlord. If tenant wishes to rent from the landlord, the tenant is obliged to accept the terms of the agreement without modification. The liquidated damage clause must therefore be interpreted having regard to the *Contra Proferentum* doctrine: simply put, this means that any ambiguity in the clause in question must be resolved in the manner most favourable to the tenant.

The liquidated damages clause indicates that where a tenant ends the tenancy earlier than the agreement allows, the Landlord may, as an option, treat the agreement as ended and in such event the sum of \$685.00 becomes payable by the Tenant. The

clause however also includes provision that regardless of this option being chosen, the Landlord is not precluded from pursuing another remedy available in law, including loss of rental income. This provision ignores the fact that payment of the liquidated damage amount is triggered by the Landlord's option to treat the agreement as being at an end, as opposed to the option to affirm the contract and the continuing obligation to pay rent despite the breach. The liquidated damage clause requires the Landlord to make a choice; if the Landlord chooses to claim the liquidated damage amount it must elect to treat the agreement as being at an end. This choice is incompatible with a claim for future loss of rent because the Tenant's obligation to pay rent is dependent upon the Landlord's affirmation of the agreement. In order to hold the Tenant accountable for future rent, subject only to the Landlord's obligation to mitigate its loss, the Landlord must in essence say to the Tenants: "I expect you to continue to abide by your agreement to pay rent until the end of the term." I find that the Landlord may not end the agreement on the one hand and at the same time demand that the Tenant abide by the agreement. Given this ambiguity in the liquidated damages clause, I interpret the clause in favour of the Tenant; given the Landlord's option to claim liquidated damages, I find that there is no longer a remedy available in law or in equity for the payment of future loss of rental income. I therefore deny the Landlord's claim for loss of revenue for the month of March 2011.

Section 16 of the Act provides that the rights and obligation of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into whether or not the tenant ever occupies the rental unit. As rent is due and payable on or before the first day of each month, I find that the Tenant was obliged to pay for the rent due on February 1, 2011. Given the undisputed evidence that this rent was not paid, I find that the Landlord has proven a claim for unpaid rent for the month of February in the amount of \$1,370.00. Given the liquidated damages clause in the lease agreement and the Landlord's option to treat the tenancy as ended, I find that the Landlord is also entitled to liquidated damages in the amount of \$685.00. The Landlord

is entitled to recovery of the \$50.00 filing fee for a total entitlement of **\$2,105.00**. The **security deposit** will be off-set from the award made herein.

Calculation for Monetary Order

Rental Arrears	\$1,370.00
Liquidated damages	685.00
Filing Fees for the cost of this application	50.00
Less Security Deposit and interest <i>to date</i>	-685.00
Total Monetary Award	\$1,420.00

Conclusion

I order that the Landlord retain the **deposit** and interest of \$685.00 in partial satisfaction of the claim and I grant the Landlord an order under Section 67 of the Act for the balance due of \$1,420.00. If necessary, this order may be 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*.

Dated: June 20, 2011.

Residential Tenancy Branch