



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, FF

Introduction

This hearing was scheduled in response to the landlord's Application for Dispute Resolution, in which the landlord has made application requesting compensation for damage or loss under the Act, to retain all or part of the security deposit and to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Both parties were present at the hearing. At the start of the hearing I introduced myself and the participants. The hearing process was explained, evidence was reviewed and the parties were provided with an opportunity to ask questions about the hearing process. They were provided with the opportunity to submit documentary evidence prior to this hearing, all of which has been reviewed, to present affirmed oral testimony and to make submissions during the hearing. I have considered all of the evidence and testimony provided.

Preliminary Matter

The tenant confirmed that the co-tenant, his partner, had also been served with Notice of the hearing.

Issue(s) to be Decided

Is the landlord entitled to compensation for a lease-breaking fee in the sum of \$300.00?

May the landlord retain the deposit in satisfaction of the claim?

Is the landlord entitled to filing fee costs?

Background and Evidence

The tenancy commenced in September 2010; a security deposit in the sum of \$797.50 and pet deposit of \$200.00 was paid. This was a fixed term tenancy that was to end on August 31, 2011. A copy of the agreement was supplied as evidence.

On April 29, 2011, the tenants gave written notice they would vacate on May 31, 2011; the copy of the written notice supplied as evince indicated that tenants were leaving as the result of on-going roof leaks and the fear that a catastrophic failure of the roof might occur. The tenant cited mould growth as a result of the moisture problems.

A copy of the inspection report indicated that the parties met on May 31, 2011, at which time the tenants signed an agreement disagreeing with the landlord's intent to retain \$300.00 from the deposits as liquidated damages.

The landlord returned a portion of the deposit to the tenants, in the sum of \$697.50; the applied claiming against the deposit within 15 days of May 31, 2011; when the tenant supplied their written forwarding address.

The tenancy agreement included a clause that indicated the tenants must pay \$300.00 for as a "lease-breaking sum," that may be deducted from the security deposit or be paid otherwise. This term of the agreement was to be imposed should the tenants terminate the lease prior to August 31, 2011. The landlord testified that the unit was re-rented effective June 15, 2011.

The tenant stated that they vacated as a result of the landlord's failure to make necessary repairs to the roof. Throughout the tenancy water leaked into common areas and the tenant's unit experienced mould growth. The tenants were afraid that their possessions could be ruined as a result of the landlord's failure to properly maintain the property. The tenant stated he repeatedly spoke to the landlord, who only had portions of the roof patched when they knew the roof was beyond its useful lifespan.

The landlord provided copies of roofing repair invoices showing repairs made on September 12, 2010 (temporary); September 15, 2010; January 13 (temporary) and 17, 2011; March 29 (temporary) and April 5, 2011; and a re-roofing invoice dated May 31, 2011.

The landlord testified that the tenant had a \$10.00 credit on their account; therefore, the claim for liquidated damages is \$290.00.

Analysis

The landlord is currently holding a deposit in the sum of \$300.00, which they wish to retain, less a \$10.00 credit, as liquidated damages.

Residential Tenancy Guidelines are provided as a statement of the policy intent of the legislation, and have been developed in the context of the common law and the rules of statutory interpretation. Residential Tenancy Branch Policy #4 references Liquidated damages provides, in part:

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.

I find that clause 3 of the tenancy agreement signed between the parties included a term imposing \$300.00 liquidated damages should the tenants end the tenancy prior to the end of the fixed term. I note that the term allows the landlord to deduct the liquidated damages from the deposit; this portion of the term is not consistent with section 20(e) of the Act. A tenant may not agree to deductions from the deposit until the end of the tenancy, at which point agreement must be given in writing.

I have considered the tenant's submission that the landlord failed to maintain the rental unit and residential property which resulted in continual leaks in the building; resulting in a breach of a material term of the tenancy. Section 45 of the Act provides, in part:

(3) If a landlord has failed to comply with a material term of the tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation within a reasonable

period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

There was no evidence before me that the tenants provided the landlord with written Notice of the failure, as required by the Act. In the absence of an application by the tenants, setting out their claim for loss, I find that that the term requiring payment of liquidated damages is valid and that the landlord is entitled to \$300.00; less the \$10.00 credit.

The landlord is currently holding a balance of \$340.00 of the deposits paid and a key fob deposit.

I find that the landlord's application has merit, and I find that the landlord is entitled to recover the filing fee from the tenant for the cost of this Application for Dispute Resolution.

Conclusion

I find that the landlord has established a monetary claim, in the amount of \$340.00, which is comprised of \$290.00 damage or loss and \$50.00 in compensation for the filing fee paid by the landlord for this Application for Dispute Resolution.

The landlord will be retaining the tenant's security deposit in the amount of \$340.00 in satisfaction of the monetary claim.

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: September 28, 2011.

Residential Tenancy Branch