



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNSD, MNDC, FF

Introduction

This hearing dealt with cross applications. The tenant applied for return of double the security deposit after subtracting an authorized deduction. The landlord applied for damage or loss under the Act, regulations or tenancy agreement and authority to retain the security deposit. Both parties appeared at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

1. Is the tenant entitled to double the security deposit?
2. Is the landlord entitled to compensation for a lease break fee and wall damage?

Background and Evidence

A tenancy between the tenant and former landlord commenced September 1, 2010. The tenancy was a fixed term set to expire August 30, 2011. The tenant was required to pay rent of \$1,070.00 on the 1st day of every month and paid a \$525.00 security deposit. The tenant vacated the rental unit on May 31, 2011 and provided her forwarding address, in writing, on that day. The tenant had agreed to a deduction of \$45.00 for wall damage, in writing, when the move-out condition inspection report was prepared. The landlord filed an Application for Dispute Resolution June 17, 2011.

With her application, the tenant is seeking \$960.00 from the landlord for return of double the security deposit after deducting \$45.00 for the wall damage she agreed to pay for $[(\$525.00 - 45.00) \times 2]$. The landlord explained that the landlord's application was filed 17 days after the tenancy ended because they took over management of the property approximately one month prior to the tenancy ending and they were very busy dealing with the newly acquired property.

By way of the landlord's application, the landlord is seeking authorization to deduct \$45.00 from the security deposit for the wall damage and a \$300.00 lease break fee for the tenant's early termination of the tenancy.

Clause 5 of the tenancy agreement provides the following liquidated damages clause:

If the tenant ends the fixed term tenancy, or in breach of the Residential Tenancy Act or a material term of this Agreement that caused the landlord to end the tenancy before the end of the term as set out in B above, or any subsequent fixed term, the tenant will pay to the landlord the sum of \$300.00 as liquidated damages and not as a penalty. Liquidated damages are an agreed pre-estimate of the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent, or for damage to the rental unit or residential property.

The tenant did not agree that she was obligated to pay the lease break fee. The tenant pointed to a letter she wrote to the landlord on April 25, 2011 in which she outlines numerous problems she experienced during her tenancy. The most significant issue was the lack of hot water for six weeks which caused the tenant to look at alternative accommodation. Although the tenant acknowledged that the hot water issue and other issues had improved since the current landlord took over management, the tenant explained that she had already found another apartment to move to. The tenant gave an effective date to move out as June 1, 2011 in the letter and acknowledged that she was breaking the lease.

The tenant submitted that hot water is a necessity for occupation and that before she began looking for alternative accommodation she afforded the landlord a reasonable amount of time to resolve the issue after making numerous verbal complaints. Without a sufficient supply of hot water the tenant was of the position she was entitled to end the tenancy. The tenant explained that she did not want to move but she found a new apartment when the hot water was still not working properly.

The landlord responded to the tenant's submissions by acknowledging that there were problems with the hot water that began before they took over management but the plumber was called immediately and the problem was resolved shortly after they took over management. The landlord was of the position they should not suffer a loss due to the previous management of the property.

Analysis

Upon consideration of all of the evidence before me, I make the following findings and provide the following reasons for those findings.

Security deposit

The Act permits a landlord to obtain a tenant's written consent for deductions for damages if the landlord has met the inspection report requirements. I am satisfied the landlord obtained the tenant's written consent to deduct \$45.00 from the security deposit for wall damage. The landlord was required to comply with section 38(1) of the Act by either returning the balance of the security deposit to the tenant or making an application for dispute resolution within 15 days from the later of the day the tenancy ended or the date the landlord received the tenant's forwarding address in writing.

Where a landlord does not comply with section 38(1) of the Act, section 38(6) requires that the landlord must pay the tenant double the security deposit. The requirement to pay double the amount of the deposit is not discretionary and must be administered in accordance with the Act.

I find that the tenancy ended and the tenant provided her forwarding address to the landlord in writing on May 31, 2011 but the landlord did not repay or make an application for dispute resolution within 15 days. The landlord made an application after 17 days; however, I find the landlord's reasons for filing an application within 15 days do not exempt the landlord from the requirements of the Act. Therefore, I award the tenant double the security deposit, after deducting the agreed upon amount for damage, which is \$960.00.

Liquidated damages

Section 45(3) of the Act provides that a tenant may end a fixed term tenancy if a landlord fails to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure. The intention of this provision is to put the landlord on notice that there is breach of a material term and give the landlord a reasonable amount of time to correct the breach before the tenant ends the tenancy.

In this case, the tenant submitted that the landlord's breach of a material term was supplying hot water to the rental unit. However, the only evidence I was provided with respect to the tenant giving the landlord written notice of a breach was the tenant's letter of April 25, 2011 which was after the breach was corrected by the landlord. Although I

accept the landlord was aware of the hot water issue by way of verbal complaints made by the tenant I must enforce the Act as it is written. Since I have found insufficient evidence that the tenant gave the landlord written notice to correct the hot water problem and give the landlord a reasonable amount of time to do so, I do not find the tenant was entitled to end the fixed term early under section 45(3) of the Act.

In light of the above, I find the tenant breach the fixed term tenancy agreement and the Act by ending the tenancy earlier than the expiry date of the tenancy agreement.

Residential Tenancy Policy Guideline 4 provides for liquidated damages. A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance as to the damages payable in the event of a breach of the fixed term by the tenant. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. Therefore, I grant the landlord's request to recover liquidated damages of \$300.00 from the tenant.

As the claim for wall damage has been dealt with in my award for return of the security deposit above, I find it unnecessary to further consider the landlord's request for recovery of this amount.

Monetary Order

As both parties were successful in their applications I offset the filing fees paid by each of the parties for their respective applications and make no award for recover of the fees paid.

Also in accordance with section 72 of the Act, I offset the landlord's award against the tenant's award and provide the tenant with a Monetary Order in the net amount of \$660.00 [\$960.00 tenant's award – \$300.00 landlord's award] to serve upon the landlord. The Monetary Order may be enforced in Provincial Court (Small Claims) if necessary.

Conclusion

Both parties were successful in their applications. I have offset their monetary awards and provide the tenant with a Monetary Order in the net amount of \$660.00 to serve upon the landlord.

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: October 05, 2011.

Residential Tenancy Branch