



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 11:13 a.m. in order to enable the tenant to connect with this hearing scheduled for 11:00 a.m. The landlord attended the hearing and was given a full opportunity to be heard, to present evidence and to make submissions. The landlord testified that on November 1, 2011, the landlord received the tenant's written notice to end this tenancy by December 1, 2011. The landlord testified that a copy of the landlord's dispute resolution hearing package was sent to the tenant on December 8, 2011 by registered mail. She provided the Canada Post Tracking Number to confirm this mailing. I am satisfied that the landlord served the tenant with a copy of this package in accordance with the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? Is the landlord entitled to a monetary award for damage arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This one-year fixed term tenancy commencing on May 1, 2011 was scheduled to end by April 30, 2012. Monthly rent was set at \$725.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$362.50 security deposit paid on April 29, 2011.

The landlord applied for a monetary award of \$1,022.00, which included the following:

Item	Amount
Maintenance Charge	\$35.00
Lease Break Fee	350.00
Recovery of Rental Incentive Concessions for 7 Months (7 x \$91.00 = \$637.00)	637.00
Total Monetary Award Requested	\$1,022.00

The landlord also applied to recover the \$50.00 filing fee for this application.

The landlord entered into written evidence a copy of:

- the tenant's November 1, 2011 written notice to end this tenancy;
- the joint move-in and move-out condition inspection reports;
- a signed Move-in/Move-Out /Charge Analysis, signed by the tenant on December 1, 2011 in which a total maintenance charge of \$35.00 was identified by the landlord;
- the signed residential tenancy agreement; and
- the April 29, 2011 Rental Incentive Agreement (RIA) signed by the parties and attached to the residential tenancy agreement.

The RIA allowed the tenant a monthly rental concession of \$91.00 for the term of the lease. However, the RIA specified that "if in any case the tenant breaks the lease within the specified time, any and all lease incentives agreed upon during the lease term will be immediately due and payable to" (the landlord). The tenant did not receive an incentive payment from the landlord, rather the tenant's monthly rent payments were \$91.00 less than the stated amount in the residential tenancy agreement.

Analysis

Based on the undisputed evidence presented by the landlord, I am satisfied that the landlord is entitled to a monetary award of the \$35.00 maintenance charge as set out in the signed Move-In/Move-Out/Charge Analysis.

I find that the "lease break fee" set out in the residential tenancy agreement is actually a liquidated damage clause inserted for the benefit of the landlord. Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

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.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.*
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.*
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.*

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum...

The landlord drafted the agreement calling for payment of \$350.00 as liquidated damages in the event that the tenant ended the tenancy before the end of the fixed term. This clause in the contract specified that the amount was not a penalty. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. The amount claimed in an agreement as liquidated damages is intended to be an estimate of the loss that may be suffered by the landlord if the tenant breaches the agreement by ending the tenancy early. In this case, however, the landlord has specified two separate amounts that will be payable by the tenant if he breaches the agreement by ending the tenancy early. The landlord has applied for a \$350.00 liquidated damage amount and the landlord has applied for recovery of the rental concession amount of \$637.00.

I am satisfied that the landlord is entitled to a monetary award of \$350.00, the "lease break fee" set out in section 4 of the residential tenancy agreement "as a service charge for tenancy change over costs, such as advertising, interviewing, administration, re-renting, for this short-term tenancy." I do so as I accept the landlord's assertion that this

is not a penalty but a legitimate pre-set charge for ending this fixed term tenancy early and not claiming for loss of rent for the remainder of this tenancy. I find this to be a reasonable estimate of the landlord's loss in the event of a breach.

I deny the landlord's claim for recovery of the rental incentives of \$637.00 because I find that the landlord's requested rent concession constitutes a penalty. The \$350.00 liquidated damage fee included in the residential tenancy agreement was intended to be a genuine pre-estimate of the landlord's loss in the event that the tenant breached the agreement by ending the tenancy early. I find that the landlord's claim over and above that estimated loss constitutes a penalty. In reaching this conclusion, I note that the more trivial the breach, the more onerous the penalty. Had the tenant breached this fixed term tenancy after the first month of the agreement, the cost to the tenant would only have been \$91.00, despite a breach of the remaining 11 months of this fixed term tenancy agreement. A breach of the agreement that occurred in the 11th month would have led to a rental concession fee of \$ 1,001.00, despite the breach only affecting one month of the remaining fixed term tenancy agreement. This 11-month charge would be in excess of the remaining one month of the tenancy. For these reasons, I consider the provision for the recovery of the rental concession fee constitutes a penalty, a penalty that escalates over time and in direct contrast to the actual harm caused by the breach of the fixed term tenancy agreement.

As the landlord has been partially successful in this application, I allow the landlord to recover the \$50.00 filing fee for this application from the tenant. I allow the landlord to retain the tenant's \$362.50 security deposit plus applicable interest in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period.

Conclusion

I issue a monetary Order in the landlord's favour in the following terms which allows the landlord to recover \$350.00 in losses arising out of this tenancy, \$35.00 in maintenance charges and the landlord's \$50.00 filing fee, and to retain the tenant's security deposit:

Item	Amount
Maintenance Charge	\$35.00
Liquidated Damages	350.00
Less Security Deposit	-362.50
Filing Fee	50.00
Total Monetary Order	\$72.50

The landlord is provided with these Orders in the above terms and the tenant must be served with a copy of these Orders as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders of that Court.

I dismiss the landlord's claim for recovery of rental incentive concessions without leave to reapply.

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: February 21, 2012

Residential Tenancy Branch