



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNR MNDC FF  
                              MNSD FF

### Preliminary Issues

At the outset of the hearing the Male Tenant advised he was not feeling well and requested that his father speak on his behalf as his advocate and that his mother be able to provide information as his agent.

Upon review of the Landlord's application it was noted that in the details of dispute the Landlord was seeking liquidated damages and loss of rent, in addition to his claim of unpaid rent or utilities. Therefore I amended the Landlord's application to add a request for money owed or compensation for damage or loss under the act, regulation or tenancy agreement, pursuant to section 64 (3)(c) of the Act.

The Landlord had also requested to amend his application to include a claim for painting the unit and for strata moving fees, based on his statement provided into evidence submitted after the application was filed. I have denied the request to include these additional items as there is no indication of these items being claimed on the application and therefore the Tenants would not have been informed of these claims at the time the application was filed.

### Introduction

This hearing dealt with cross Applications for Dispute Resolution filed by the Landlords and the Tenants.

The Landlords filed seeking a Monetary Order for unpaid rent or utilities, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, and to recover the cost of the filing fee from the Tenants for this application.

The Tenants filed seek the return of their security deposit, their pet deposit, and to recover the cost of the filing fee from the Tenants for this application.

The parties appeared at the teleconference hearing, acknowledged receipt of evidence submitted by the other and gave affirmed testimony. During the hearing each party was given the opportunity to provide their evidence orally, respond to each other's testimony, and to provide closing remarks. A summary of the testimony is provided below and includes only that which is relevant to the matters before me.

#### Issue(s) to be Decided

1. Have the Tenants breached the *Residential Tenancy Act*, regulation or tenancy agreement?
2. If so, has the Landlord met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to sections 67 and 7 of the *Residential Tenancy Act*?
3. Have the Landlords breached the *Residential Tenancy Act*, regulation or tenancy agreement?
4. If so, has the Tenants met the burden of proof to obtain a Monetary Order as a result of that breach, pursuant to sections 67 and 7 of the *Residential Tenancy Act*?

#### Background and Evidence

At the outset of the hearing the female Tenant stated that she has not checked her mail since April 12, 2012 and that she has not yet received the Landlord's evidence. The male Tenant confirmed receipt of the Landlord's evidence. The Landlord provided affirmed testimony that his evidence was sent to the female Tenant by priority mail on April 12, 2012 and based on the Canada Post website the package was successfully delivered to the female Tenant's address on April 16, 2012. As the Tenants are jointly and severable liable, I accept that each Tenant was sufficiently served the Landlord's evidence, pursuant to section 88 of the Act.

The following facts were not in dispute and were agreed upon by each party during the teleconference hearing:

- The parties entered into a fixed term tenancy agreement that began on October 1, 2011 and was set to end on September 30, 2012; and
- The monthly rent was payable on the first of each month in the amount of \$1,950.00; and
- On September 18, 2011, the Tenants paid a security deposit of \$975.00 plus a pet deposit of \$500.00; and

- There were no condition inspection reports completed at move in or at move out; and
- On December 8, 2012 the Tenants provided the Landlord with notice to end the tenancy effective January 31, 2012; and
- The Landlord regained possession of the unit on January 31, 2012 at which time the Landlord determined the unit was left in a clean and undamaged condition; and
- The Landlord received the female Tenant's forwarding address February 1, 2012 and the male Tenant's forwarding address shortly after February 4, 2012.

The Landlord affirmed their written agreement included a clause for liquidated damages which he clarified to be "a penalty charged for cancelling the tenancy". The Landlord stated that both he and his son are very busy so they only want fixed term leases. Also, he stated his unit is very difficult to re-rent in the winter time which is why they include "the penalty charge" into their agreement to deter tenants from moving out in the winter.

In clarifying his claim the Landlord confirmed he was reducing the amount of his claim to \$3,800.00 which includes \$1,950.00 as the "penalty" liquidated damages, \$1,950.00 for February 2012 rent, plus \$50.00 for each month that he has re-rented the unit at the lower rent of \$1,900.00. Then later in his testimony he attempted to include the cost of painting and the strata moving out fees into his claim.

The female Tenant affirmed that she thought the penalty charge was a onetime charge to cancel her lease which is why she initially agreed to have the pet deposit go towards this fee. When she found later that the Landlord wanted the liquidated damages and several months of rent she changed her mind and requested that her pet and security deposit be returned.

The Advocate for the Tenant affirmed that they thought the penalty would end the Tenants' responsibilities and they were concerned they were going to be extorted for rent for each month the unit remained vacant. They questioned why the Landlord would be claiming for the \$50.00 rent shortfall each month when the only evidence they have displays the unit was only advertised at the lower amount and there is no indication the Landlord attempted to rent the unit at the same monthly rent. He also argued the Landlord should not be able to claim the additional amounts for painting and the move out fee when those claims had nothing to do with this tenancy and were expenses the Landlord incurred afterwards.

In closing the female Tenant noted that the Landlord should not be able to claim more than half the monthly rent for liquidated damages and that this charge should be a pre-determined genuine estimate of losses; however in this case it is clear the Landlord was charging them a penalty.

The Landlord had nothing further for closing remarks nor did the male Tenant's advocate.

### Analysis

I have carefully considered the aforementioned and the documentary evidence which included, among other things, copies of: the tenancy agreement; addendum, numerous e-mails between the parties, and text messages between the parties.

A party who makes an application for monetary compensation against another party has the burden to prove their claim. Awards for compensation are provided for in sections 7 and 67 of the *Residential Tenancy Act*.

### **Landlord's application**

The Landlord has affirmed the liquidated damage claim he is seeking is a "penalty" charged to the Tenants for them breaking the one year lease.

The *Residential Tenancy Policy Guideline # 4* provides that 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.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause, including the Landlord's interpretation of what the amount being charged is for and also if the sum being charged is considered extravagant in comparison to the greatest loss that could follow a breach

Based on the aforementioned, and on a balance of probabilities, I find that by the Landlord's own definition, the amount listed on the tenancy addendum is in fact a penalty being charged to the Tenants for breaking their lease. Furthermore, I find

the amount being claimed of \$1,950.00 to be an extravagant amount considering the Landlord did not incur costs to advertise the unit, as it was advertised through a free internet sight. The other items listed as expenses for re-renting the unit are not associated with this claim as the Landlord affirmed the unit was left in clean and undamaged condition at the end of the tenancy. Therefore, I dismiss the Landlord's claim for liquidated damages, as I have found this amount to be a penalty and is therefore unenforceable.

Section 45(2)(b) of the Act stipulates that a tenant may end a fixed term tenancy by giving the Landlord notice to end the tenancy effective on a date that is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

In this case, the Tenants' tenancy agreement was for a fixed term ending September 30, 2012; however the Tenants provided notice to end the tenancy early on January 31, 2012. The Landlord re-rented the unit as of March 1, 2012.

Accordingly, I find the Tenants ended the tenancy on a date that is in breach of section 45(2)(b) of the Act which caused the Landlord to suffer a loss for February 2012 rent. Therefore, I award the Landlord monetary compensation for loss of February 2012 rent in the amount of **\$1,950.00**.

The Landlord affirmed he attempted to re-rent the unit for as soon as and that he offered an incentive of repainting the unit to encourage a new tenant to sign another one year lease as soon as possible. The evidence supports the Landlord was successful in mitigating his loss by lowering the rent and offering the painting incentive. Therefore, I do not accept the Tenant's Agent's argument that the Landlord should suffer the loss because he did not advertise the unit at the higher rent from the beginning; rather I accept the Landlord's argument that he has past experience and difficulty renting the unit during the winter. Accordingly I find the Landlord has suffered a loss due to the Tenants' breach of the tenancy agreement and the Act and I award the Landlord **\$350.00** for loss of rent from March to September 2012 (7 x \$50.00).

The Landlord has partially been successful with his claim; therefore I award recovery of the **\$50.00** filing fee.

**Tenants' application**

The evidence supports the tenancy ended January 31, 2012 and the Landlord received the female Tenant's forwarding address February 1, 2012, and the male Tenant's forwarding address shortly after the first week of February 2012. No condition inspection reports were completed at the onset or at the end of this tenancy and the Landlord has confirmed there was no damage caused by a pet.

Section 38(1) of the *Act* stipulates that if within 15 days after the later of: 1) the date the tenancy ends, and 2) the date the landlord receives the tenant's forwarding address in writing, the landlord must repay the security deposit and pet deposits in full, to the tenant with interest or make application for dispute resolution claiming against the security deposit and pet deposit.

Section 38(7) of the *Act* stipulates a pet damage deposit may be used only for damage caused by a pet to the residential property, unless the tenant agrees otherwise. Therefore, in this case I find the Landlord was required to return the Tenants' pet deposit in full in the amount of \$500.00 no later than February 21, 2012. The Landlord has not returned the pet deposit.

Based on the above, I find that the Landlord has failed to comply with Sections 38(1) and 38(7) of the *Act* with respect to the pet deposit and that the Landlord is now subject to Section 38(6) of the *Act* which states that if a landlord fails to comply with section 38(1) the landlord may not make a claim against the pet deposit and the landlord must pay the tenant double the pet deposit.

Based on the aforementioned I find the Tenants are entitled to the return of double the pet deposit in the amount of **\$1,000.00** (2 x \$500.00).

With respect to the security deposit of \$975.00 I find the Landlord made application for dispute resolution within the required 15 day period for rent and loss of rent, not damages, in accordance with Section 38(1) of the *Act*. Therefore the Tenants would only be entitled to return of actual deposit amount of **\$975.00**.

I find that the Tenants have succeeded with their application; therefore I award recovery of the **\$50.00** filing fee.

## **OFFSET OF CLAIMS**

**Monetary Order** – I find that the Landlord is entitled to a monetary claim and that this claim meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenants' security and pet deposits plus interest, as follows:

Loss of Rent February 2012	\$1,950.00
Loss of Rent March to September @ \$50.00/month	350.00
Filing Fee	<u>50.00</u>
<b>SUBTOTAL DUE TO THE LANDLORD</b>	<b><u>\$2,350.00</u></b>
 <b>LESS: AMOUNTS DUE TO THE TENANTS</b>	
Double Pet Deposit 2 x \$500.00 + Interest of \$0.00	-1,000.00
Security Deposit \$975.00 + Interest of \$0.00	975.00
Filing Fee	<u>50.00</u>
<b>SUBTOTAL DUE TO THE TENANTS</b>	<b><u>\$2,025.00</u></b>
 <b>Offset amount due to the LANDLORD</b>	<b><u>\$ 325.00</u></b>

#### Conclusion

The Landlord's decision will be accompanied by a Monetary Order in the amount of **\$325.00**. This Order is legally binding and must be served upon the Tenants.

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: April 20, 2012.

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Residential Tenancy Branch