



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 convened on May 30, 2012 and was reconvened to allow for service of evidence to today's session, June 26, 2012, and dealt with an Application for Dispute Resolution by the Landlord to obtain a Monetary Order for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement, to keep all or part of the pet and security deposits, and to recover the cost of the filing fee from the Tenant 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. Is the Landlord entitled to a Monetary Order?

Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement that was scheduled to begin April 1, 2012 and end on April 30, 2013. Rent was to be payable on the first of each month in the amount of \$775.00 plus \$15.00 utilities. On February 27, 2012 the Tenant provided the Landlord with payment of \$805.00 which included payment for the \$395.00 security deposit, \$395.00 pet deposit plus April 1, 2012 utility payment of \$15.00. The Tenant provided the Landlord a second payment of \$775.00 for prepayment of the first month's rent that was due April 1, 2012.

The Landlord submitted a copy of a letter dated March 15, 2012, issued by the Tenant cancelling her lease prior to the start date of the tenancy. The Landlord then pointed to an agreement he had the Tenant sign on March 19, 2012 whereby she signed agreeing to the Landlord keeping the \$790.00 deposits (\$395.00 + \$395.00) plus \$750.00 for liquidated damages. He confirmed the Tenant never took possession of the unit and is seeking to keep the deposits because he has lost rent for April 2012.

The Landlord pointed to #5 of their tenancy agreement which provides for liquidated damages of \$750.00 and argued that he was entitled to this amount because the

Tenant broke her agreement. He advised that he advertised the unit on the internet on a free site and another site which charged \$28.00. He stated that he also advertised the unit in the local newspaper at a cost of \$151.00 however he did not submit proof of this cost in his evidence. He stated that this liquidated damages amount was to cover his expenses in re-renting the unit which involves travel time and costs, credit check fees and advertising. He later acknowledged that he lives just down the street from the rental unit so travel costs would be at a minimum.

The Landlord confirmed that he was able to re-rent the unit effective May 1, 2012 and that he entered into this agreement with his new tenants on March 29, 2012.

The Tenant confirmed providing the Landlord with her first payment on February 21, 2012 after seeing the rental unit in the evening while the current tenant's possessions were inside. She saw the unit a second time in daylight at which time she saw the unit was full of humidity and she had concerns about the carpet so she requested the Landlord have the carpets replaced with laminate. She argued that the Landlord agreed to change the carpets if she provided him with payment for her first month's rent so he could use it to pay for the new flooring. After she provided the pre-payment for April 2012 rent the Landlord told her he would not be changing out the carpet but that he would make sure it was professionally cleaned.

The Tenant asserted that it was because the Landlord changed his mind about replacing the carpet and given her health condition that she had to cancel her tenancy agreement. She acknowledged signing the agreement to end which indicated the Landlord would be keeping the deposits and \$750.00; however she stated she did not understand what she was signing. She also stated that she was under stress given her current family situation and she was distressed and wanted to do things as requested by the Landlord because he was holding all of her post dated cheques. She confirmed that he has since returned these cheques to her.

The Tenant does not recall discussing the liquidated damages clause with the Landlord and argued that he told her to read the agreement and then pointed where she was required to initial and sign. She is of the opinion that the liquidated damages listed is in fact a penalty as it is very high in relation to the costs incurred to re-rent this unit. The Landlord lives on the same street so travel costs are not a factor and the unit was listed on internet sites.

In closing the Landlord argued that he went through all points of the tenancy agreement with the Tenant and that she told him she read them and understood them clearly.

Analysis

I find that in order to justify payment of damages or losses under section 67 of the *Act*, the Applicant Landlord would be required to prove that the other party did not comply

with the Act and that this non-compliance resulted in costs or losses to the Applicant pursuant to section 7 of the Act.

Section 5 of the Act stipulates that landlords and tenants cannot avoid or contract out of the Act or Regulations and any attempts to do so are of no effect.

The Act stipulates that a Landlord may required a security and pet deposit for an amount that is not greater than an amount equal to $\frac{1}{2}$ of a month's rent for each deposit. In this case the rent was \$775.00 therefore the amount collected by the Landlord for the security deposit of \$395.00 and the pet deposit of \$395.00 exceed the allowable amount of \$387.50 for each deposit.

Section 45(2) of the Act provides that a tenant may end a fixed term tenancy agreement by providing notice to end the tenancy on a date that is not earlier than the end of the fixed term.

In this case the Tenant ended the tenancy prior to the end of the fixed term which caused the Landlord to suffer a loss of rent for the month of April 2012. Accordingly I find the Landlord has met the burden of proof and I award him **\$775.00** for loss of April 2012 rent.

The tenancy agreement provided for liquidated damages of \$750.00. The *Residential Tenancy Policy Guideline # 4* provides that a liquidated damages clause is a clause in a tenancy agreement where the parties are to agree in advance on 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. When considering the sum of the liquidated damages the Dispute Resolution Officer will determine if the clause may be held to constitute a penalty which would render the clause unenforceable.

When reviewing the amount being claimed by the Landlord for liquidated damages I have considered the following: (1) the circumstances surrounding the signing of the tenancy agreement as provided by the Tenant; and (2) English is a second language for the Tenant; and (3) the amount of \$750.00 listed as liquidated damages in relation to the monthly rent of \$775.00; and (4) actual costs to re-rent a unit such as advertising and credit checks; and (5) the Landlord entered into a new tenancy agreement ten days after the Tenant cancelled her tenancy.

Based on the aforementioned I find the \$750.00 liquidated damages amount constitutes a penalty as it far exceeds a reasonable estimate of what it would cost to re-rent the unit. In this case even if the Landlord had paid \$179.00 to advertise the unit and showed the unit to three prospective tenants then had a credit check completed his costs would be far less than \$750.00. Accordingly, I find the liquidated damages clause to be unenforceable and I dismiss the Landlord's claim.

The Landlord has partially been successful with his application; therefore I award partial recovery of the filing fee in the amount of **\$25.00**.

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, pet deposit, and prepaid rent and utilities as follows:

Loss of Rent for April 2012	\$ 775.00
Filing Fee	<u>25.00</u>
SUBTOTAL	<u>\$ 800.00</u>
LESS: Security Deposit plus interest of \$0.00	(395.00)
Pet Deposit plus interest of \$0.00	(395.00)
Prepaid Utilities	(15.00)
Prepaid Rent \$775.00	(775.00)
PLUS: \$40.00 reimbursed by the Landlord	<u>40.00</u>
Offset amount due to the TENANT	<u>\$ 740.00</u>

The Landlord is HEREBY ORDERED to return the balance of \$740.00 to the Tenant forthwith.

Conclusion

The Tenants' decision will be accompanied by a Monetary Order in the amount of **\$740.00**. This Order is legally binding and must be served 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: June 27, 2012.

Residential Tenancy Branch