



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute codes MND MNSD MNDC FF

Introduction

This hearing dealt with an application by the landlord for a monetary order and an order allowing retention of the security deposit in partial satisfaction of the claim. The landlord has also requested recovery of the \$50.00 filing fee from the tenant. Both parties attended the hearing and had an opportunity to be heard.

Issues

Is the landlord entitled to the requested orders?

Background and Evidence

This tenancy began on July 1, 2011 and ended on February 29, 2012. The term of the lease was supposed to have been for 11 months ending on May 31, 2012. The rent was \$1,150.00 per month. A security deposit of \$575.00 was paid at the start of the tenancy. A condition inspection report was completed upon move-in and move-out.

On January 19, 2012 the landlord served the tenants with a hand-written notice which stated that they wanted the tenants to vacate the rental unit by no later than 1:00 p.m. on February 29, 2012 on the basis of breach of a material term of the tenancy agreement. The tenants advised the landlord in writing on the same day that the notice that they had served was not in the proper form. The landlord subsequently served the tenants with "caution notices" on January 20, 2012 and February 2, 2012 in which the tenants were warned that they were breaching material terms of the tenancy agreement. The breaches related to the tenants boyfriends who, the landlord felt, were spending almost every night at the rental unit. After the tenants received the second "caution notice" the tenants decided they no longer wanted to reside in the rental unit and gave the landlord written notice on February 3rd that they intended to move out on February 29th. In their notice the tenants stated as follows: *"..given your initial eviction notice the other week we would like to be leaving penalty free and with our damage deposit back."* In response, the landlord served the tenants with a letter which stated as follows:

"I have acknowledged receipt of your notice ending your tenancy... which we received on February 3, 2012. Please be advised that this is short notice and does not comply with

the Residential Tenancy Act's requirement or our tenancy agreement. Under a fixed term tenancy agreement, you may not give notice to end the tenancy effective any earlier than the end of the fixed term. That date is May 31, 2012.

I will do everything reasonable to find a new tenant as soon as possible. Please refer to clause No. 5 (liquidated damages) this applies to the time and money I will lose trying to rent the place which means advertisement costs, time it takes to interview possible tenants, credit checks, etc. ...Also, note that the sum of \$1,150.00 will be disregarded, since the cost will be much less than this.

This acknowledgement, however, does not constitute a waiver of my right to claim liquidated damages for early termination of a fixed term tenancy. Moreover, regarding the security deposit, you and I had an inspection done when you first moved in, it all depends on how you leave the place...

Ultimately, a move-out inspection report was filled out by the landlord without the tenant's participation. The tenants say that they left while the inspection was being done because the landlord told them to leave. The landlord acknowledged that he asked the tenants to leave when it became so heated between them.

In terms of the condition in which the unit was left by the tenants, the landlord claims that the unit was not properly cleaned and that the tenants damaged the entry door and door jamb. For their part, the tenants claim to have cleaned the unit "to the best of their ability" but acknowledge that they did forget to clean some things and that they did damage the door while moving some large furniture.

The rental unit was re-rented to new tenants for March 15, 2012.

Analysis

The landlord has made a monetary claim against the tenant comprised of the following:

Lost income for 1 st half of March	\$575.00
Liquidated damages	\$375.00
Cleaning and repair – labour	\$390.00
Cleaning and repair – supplies	\$44.73
Filing fee	\$50.00
TOTAL	\$1434.73

I shall deal with each of these claims in turn.

Lost income (\$575.00) – The landlord's position is that they are entitled to half a month's rent because the tenants gave late notice. Since the landlord was able to rent the unit for March 15, the landlord is only claiming half of the rent for March. The tenants dispute this claim on the basis that they only gave notice because the landlord "made it impossible to live there." The tenants point to the eviction notice that the landlord had already given them on January 19th and claim that they figured they were going to be evicted anyway.

While I understand the tenants felt they were under threat of eviction, the tenants had quite rightly already told the landlord that their notice was invalid and that they intended to stay. However, if the tenants had a change of mind and decided to leave, they should have informed the landlord in writing by no later than January 31, 2012 instead of waiting until February 3rd. Section 45 of the Act requires that tenants give one month's written notice to a landlord of their intent to terminate the tenancy. It matters not that the relationship between the parties had deteriorated.

Accordingly, I am satisfied that the landlord has established a claim for lost income in the amount of \$575.00.

Liquidated damages (\$375.00) – The landlord has made a claim for \$375.00 in liquidated damages which is less than the \$1,150.00 stipulated in the tenancy agreement. In considering this portion of the landlord's claim I refer to Residential Tenancy Policy Guideline No. 4 which has the following to say about claims for liquidated damages:

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.

In the present case, the liquidated damages clause states that if the tenant ends the fixed term tenancy the tenant will pay to the landlord the sum of \$1,150.00 as "an agreed pre-estimate of the landlord's cost 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." However, as mentioned above, the landlord is only now seeking \$375.00 in liquidated damages.

While I understand that the landlord is trying to be reasonable in its decision to lower the amount being claimed as liquidated damages, the problem is that this amounts to a unilateral change to the original contract between the parties. As a result, it is not open to the landlord to make the lesser claim. The landlord is stuck with the original liquidated damages clause and because of what I consider to be the extravagant amount of that clause I find that it is more in the nature of a penalty than a genuine pre-estimate of loss and therefore unenforceable. Accordingly, I find that the landlord is not entitled to any damages under this head.

Cleaning and repair – labour (\$390.00) – The landlord has claimed \$390.00 in labour for cleaning and repair of the rental unit. This portion of the landlord's claim is based on Section 37 of the Act which requires that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

The amount claimed by the landlord is equivalent to approximately 19 hours at \$20.00 per hour. Given the photographs submitted by the landlord showing the condition of the unit and the fact that the tenants acknowledged that they forgot to clean some things and damaged the front door when they were moving out – I am satisfied that the landlord has established this portion of the claim.

Cleaning and repair – supplies (\$44.73) – The landlord has submitted an itemized receipt from Canadian Tire dated March 4, 2012 in support of this portion of the claim. On the strength of this receipt I am satisfied that the landlord has established this claim.

Filing fee - Given that the landlord has been largely successful in its claim, I am satisfied that the landlord is entitled to recover the \$50.00 filing fee from the tenant.

Conclusion

I find that the landlord has established a total monetary claim of \$1,059.73. I therefore order that the landlord retain the deposit and interest of \$575.00 in partial satisfaction of the claim and I grant the landlord an order under section 67 for the balance due of \$484.73. This order may be filed in the Small Claims Court and enforced as an order of that Court.

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*.