



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Hollyburn Properties Limited  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNR, MNSD, 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 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.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions and to cross-examine one another. The tenant confirmed that she received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on March 6, 2013. I am satisfied that the landlord served the tenant with this package and that both parties served one another with their written evidence packages in accordance with the *Act*.

### Issues(s) to be Decided

Is the landlord entitled to an Order of Possession for unpaid rent? 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 agreement between the landlord, the tenant and a co-tenant not named as a respondent in the landlord's application for dispute resolution commenced on September 1, 2012. Monthly rent was set at \$1,375.00, payable on the first of each month. The tenants paid a \$687.50 security deposit on August 17, 2012. The landlord continues to hold that deposit.

Both parties agreed that before the end of January 2013, the tenant handed a representative of the landlord a written notice to end this tenancy by February 28, 2013.

Both parties also agreed that the tenancy ended by February 28, 2013, by which time vacant possession of the rental unit was yielded to the landlord.

The landlord applied for a monetary award of \$1,425.00. The landlord's application included a request to recover \$1,375.00 in unpaid rent for March 2013. Although the landlord's application did not specifically include a request for losses arising out of this tenancy, the landlord also identified a claim for \$805.33 for liquidated damages. The landlord entered into written evidence a copy of the February 28, 2013 joint move-out condition inspection report, which contained a Security Deposit Statement. This Statement noted that the tenant had paid \$117.83 by debit at the end of this tenancy. The landlord also sought recovery of the filing fee from the tenant.

The landlord testified that ongoing advertisements are placed in popular rental websites by the landlord for its extensive rental properties. He said that there are usually three or four vacancies per month in this 162-unit rental building. He testified that the landlord re-rented these premises to new tenants who took occupancy April 1, 2013 for a monthly rent of \$1,295.00, \$80.00 less than the tenants were paying. He did not have any information as to whether the landlord rented other units in this building of the landlord's own rental stock before the landlord attempted to mitigate the tenant's losses for March 2013.

In an April 6, 2013 letter and attachments, the two tenants who signed the Residential Tenancy Agreement (the Agreement) and attended this hearing, explained that they had agreed to let the landlord keep their security deposit and paid a further \$117.83 to enable the landlord to obtain the \$805.33 liquidated damages fee identified in Clause 5 of the Agreement. They noted that the landlord's representative who rented the premises to them assured them that if they vacated the rental unit "without reason before our contract expires, we were to give one calendar month notice and pay liquidated damage fee of \$805.33." They maintained that this provision and the landlord's acceptance of their payment and security deposit fulfilled the terms of their Agreement and prevented the landlord from simultaneously seeking \$1,375.00 in unpaid rent for March 2013. In their letter, they also noted that they intended to seek compensation from the landlord for their moving expenses due to the landlord's alleged failure to conduct repairs and thus prevent an ant infestation, as well as an incident where workers entered the rental unit without first seeking permission to do so. The tenants also noted that they were seeking a return of interest on their security deposit.

At the hearing, I noted that interest is not payable on their security deposit for the time period in question. I also advised the tenants that I could not consider their claim for a

monetary award for the recovery of their moving expenses as they had not submitted their own application for this amount, nor was this issue properly before me.

### Analysis

Both parties agreed that they had an oral agreement whereby the landlord could keep the tenants' security deposit at the end of this tenancy. The tenant did not dispute the landlord's ability to claim for liquidated damages at the end of this tenancy, and in fact, paid the landlord \$117.83 in addition to the \$687.50 security deposit, which she agreed to let the landlord retain. What is at issue is whether the landlord is also allowed to claim for the loss of \$1,375.00 in unpaid rent for March 2013.

Clause 5 of the Agreement reads as follows:

5. **LIQUIDATED DAMAGES.** *If the tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes 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 \$805.33 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...*

The landlord provided written evidence to support the accuracy of the landlord's pre-estimate of the amount of the liquidated damages charge included in the Agreement.

The Agreement provided the landlord with two options. The landlord could claim the \$805.33 in liquidated damages thereby ending the contract or treat the contract as continuing, in which case the obligations under the contract (such as payment of rent) would continue as well. However, the latter part of Clause 5 states that the landlord may make further claims with respect to the contract even though the landlord has chosen to end the contract when the landlord claimed for and received payment for liquidated damages. I find that the landlord cannot do both. The landlord must either choose to claim \$805.33 for liquidated damages in which case the contract has ended or the landlord must not claim the \$805.33 and keep the contract alive. As the landlord's own Agreement creates this ambiguity I will resolve the matter in favour of the tenant and allow the landlord's claim for the \$805.33, rather than for loss of rental income of \$1,375.00, in addition to the liquidated damages charge.

In coming to this finding, I noted that at the joint move-out condition inspection, the landlord identified \$178.30 as owing by the tenant(s) to arrive at the total liquidated

damage charge of \$805.33, after the oral agreement to let the landlord keep the tenants' security deposit. The landlord accepted the tenant's debit payment. These actions are consistent with the tenants' undisputed evidence that they were clearly told by the landlord's representative at the commencement of this tenancy that they would only be held responsible for the liquidated damages payment if they ended their tenancy early.

In addition, I find that the landlord did not provide sufficient evidence to demonstrate that the landlord's duty to mitigate the tenant's losses under section 7(2) of the *Act* had been properly undertaken. For example, I find that the landlord produced few details as to the advertising of the rental availability of this rental unit. The landlord also provided no evidence as to whether the landlord first rented other similar units in this same building from its own rental stock before making efforts to mitigate the tenant's losses for March 2013. Thus, even if I am wrong on my interpretation of Clause 5 of the Agreement, which under these circumstances I find disentitles the landlord from claiming for both liquidated damages and unpaid rent, I still find that the landlord's failure to adequately demonstrate the mitigation of the tenant's losses for March 2013 prevents the landlord from obtaining a monetary award for unpaid rent for March 2013.

As the outcome achieved by the landlord essentially parallels the oral agreement achieved with respect to the tenants' security deposit, I dismiss the landlord's application to recover the filing fee from the tenant without leave to reapply.

### Conclusion

I give effect to the oral agreement reached between the parties and order the landlord to retain the \$687.50 security deposit paid for this tenancy plus applicable interest. No interest is payable over this period.

I also issue a monetary award in the landlord's favour in the amount of \$117.83 to compensate the landlord for the difference between the tenants' security deposit and the liquidated damages charge of \$805.33 identified in Clause 5 of the Agreement and already collected by the landlord. I give legal effect to the \$117.83 payment already made to the landlord to totally satisfy the amount owed by the tenants to the landlord for liquidated damages at the end of this tenancy. I make no monetary Order, as the landlord has received the tenants' liquidated damages payment in the form of the security deposit and the \$117.83 payment cited above.

I dismiss the landlord's application for a monetary award for unpaid rent and for the recovery of the filing fee for this application 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: June 04, 2013

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Residential Tenancy Branch

