



# 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 dealt with the landlord's Application for Dispute Resolution seeking a monetary order.

The hearing was conducted via teleconference and was attended by the landlord, her agent, and two of the tenants.

At the outset of this hearing the landlord testified that she had re-rented the unit effective September 1, 2013 and as such was reducing her total claim from \$10,867.50 to \$8,767.50.

### Issue(s) to be Decided

The issues to be decided are whether the landlord is entitled to a monetary order for lost revenue and property management fees; for all or part of the security deposit and to recover the filing fee from the tenants for the cost of the Application for Dispute Resolution, pursuant to Sections 45, 67, and 72 of the *Residential Tenancy Act (Act)*.

### Background and Evidence

The landlord provided a copy of a tenancy agreement signed by the parties on October 1, 2012 for a 1 year fixed term tenancy agreement beginning on October 1, 2012 for the monthly rent of \$2,100.00 due on the 1<sup>st</sup> of each month with a security deposit of \$1,050.00 paid.

The tenancy agreement included a liquidated damages clause that states that if the tenant should end the tenancy before the end of the original term the landlord may treat the agreement as being at an end. The agreement goes on to say that in such an event the tenant will pay the landlord \$400.00 plus HST as liquidated damages.

The parties agree the tenants provided the landlord with their notice to end the tenancy on or about March 18, 2013 to be effective May 1, 2013. The parties also agree the landlord began advertising the availability of the unit on Craigslist on March 19, 2013.

The tenants submit they offered to find someone to sublet or assign the property but the landlord declined as the tenancy agreement clause 19 stipulates that the tenant may not assign or sublet the rental unit.

The parties agree that despite the landlord's indications that it was slow season and a difficult time of year to rent the property the landlord's original posting advertised the rental unit at \$2,200.00 per month; \$100.00 higher than the rent the tenants had been paying.

The landlord submits that they listed the property at this amount because that is what they had listed it at prior to this tenancy and the price of \$2,100.00 was negotiated based on the specifics of these tenants. The landlord did reduce the posting to \$2,100.00.

The tenants submit that the landlord also advertised the rental unit available only for a year lease and did not consider any tenancies for shorter terms, including any terms that would take the end of the tenancy to coincide with the end of this fixed term tenancy.

The tenants provide copies of email correspondence between the tenants; the landlord and the landlord's agent. In an email dated July 16, 2013 the landlord's agent indicates that they had been close to signing as many as 5 groups but that the other parties had backed out for various reasons including their current landlord cutting them a new deal; one who wasn't interested in paying more than \$1,900.00; or one of their potential roommates backed out at the last minute.

### Analysis

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

I accept the tenancy agreement has a clause that specifically identifies that the tenants must pay the landlord \$400.00 plus HST in the event that they end the tenancy prior to the end of the fixed term as liquidated damages. As liquidated damages are to be a genuine pre-estimate of the costs associated with re-renting the property prior to the end of the fixed term and the landlord is claiming only the amount of the actual costs of her agent in the amount of \$367.50, I find the landlord is entitled the amount claimed in full satisfaction of the liquidated damages clause.

Section 45(2) of the *Act* stipulates that a tenant may end a fixed term tenancy by giving the landlord a notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified in the tenancy agreement as the end of the tenancy and is the day before the day in the month that rent is payable under the tenancy agreement.

Section 45(3) states that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

As the tenants have provided no evidence that there was a breach of a material term I find the tenants are responsible for the payment of rent until the end of the fixed term or until September 30, 2013 subject only to the landlord's obligation to mitigate any losses.

Section 7(1) of the *Act* states if a tenant does not comply with the *Act*, regulations or tenancy agreement, the non-complying tenant must compensate the landlord for damage or loss that results. Section 7(2) requires a landlord who claims compensation for damage or loss that results from the tenant's non-compliance must do whatever is reasonable to minimize the damage or loss.

Section 34(1) of the *Act* states that unless the landlord consents in writing, a tenant must not assign a tenancy agreement or sublet a rental unit. Section 34(2) states that if a fixed term tenancy agreement is for 6 months or more, the landlord must not unreasonably withhold the consent required under subsection (1).

As such, the term identified as clause 19 in the tenancy agreement contravenes Section 34(2) and is not enforceable. I find that to deny the tenants the opportunity to assign or sublet the rental unit, which as noted contravenes the *Act*, limited the landlord's opportunities to mitigate losses suffered.

I find that initially listing the rental unit at a higher price, regardless of the rationale, than what the tenants had been paying limited the success of the landlord's attempts to re-rent the unit. I find this was a peculiar approach to re-renting the property especially in light of the landlord's insistence through her evidence and testimony that it was a difficult time of year to attempt to rent out the property.

I accept that it is the landlord's prerogative to determine who they wish to accept as a tenant; the amount of rent they wish to charge; and the duration of the term of any tenancy agreement they enter into. However, I also find that if the landlord wants to seek compensation, as in this case, restricting all of these variables severely limits the effectiveness of any attempts to mitigate.

For example, I concur with the tenants who suggest that had the landlord accepted a rental for \$1,900.00 for the remainder of the fixed term the losses suffered by the landlord that could be passed on to the tenants would have been minimal. However, by

posting the tenancy would be for a 1 year term and/or rejecting a potential tenant who is willing to pay \$1,900.00 I find the landlord has failed to do "whatever is reasonable to minimize the damage and loss"

For these reasons I dismiss this portion of the landlord's claim.

### Conclusion

I find the landlord is entitled to monetary compensation pursuant to Section 67 in the amount of **\$417.50** comprised of \$367.50 agent fees/liquidated damages and \$50.00 of the \$100.00 fee paid by the landlord for this application as she was only partially successful.

I order the landlord may deduct this amount from the security deposit held in the amount of \$1,050.00 in satisfaction of this claim. I grant a monetary order to the tenants for return of the balance of the security deposit in the amount of **\$632.50**.

This order must be served on the landlord. If the landlord fails to comply with this order the tenant may file the order in the Provincial Court (Small Claims) and be 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*.

Dated: August 29, 2013

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Residential Tenancy Branch