



# Dispute Resolution Services

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD, MNDC, FF

### Introduction

This hearing dealt with an application by the landlord for an order to retain the security deposit and a cross-application by the tenant for an order for the return of the pet and security deposits. Both parties participated in the conference call hearing, the landlord being represented by his agent B.D.

At the hearing, the tenant stated that he had received a cheque for the pet deposit and was reducing his claim to only seek the return of the security deposit.

### Issue to be Decided

Should the landlord be permitted to retain the security deposit?

### Background and Evidence

The tenancy originally began in Unit #5, for which the tenant had signed a 6 month fixed term tenancy agreement which was set to end on March 30, 2013. A security deposit and pet deposit of \$300.00 each were paid at the outset of the tenancy. After having been the subject of threats uttered by another tenant, the tenant asked the owner if he could change units as he was concerned about his safety.

The tenant testified that the owner agreed that he could move into a unit on another floor and on January 19, 2013, the tenant made that move. The security and pet deposits presumably moved with the tenant to the new unit. The tenant testified that B.D. approached him and asked him to sign a new tenancy agreement to show that he was now living in a different unit. The tenant signed the agreement without reading it.

B.D. testified that when the tenant moved into the new rental unit, he explained to him that because it was a new unit, he would be required to sign a new 6 month lease. B.D. testified that this is his usual practice and he would have no reason to diverge from it in

this case. The tenant strenuously denied that B.D. told him that he was signing a new 6 month fixed term.

The landlord seeks to retain \$300.00 pursuant to the following term:

If the terms of this lease is broken, such as if , you fail to pay the rent on time and we are forced to terminate the tenancy ,the tenants will pay the fees for re-renting the premises which is ½ of one months plus GST TAX, as well as any lost revenue until the new tenants have taken over payment of the rent. [reproduced as written]

Both parties seek to recover the filing fees paid to bring their applications.

### Analysis

It is not uncommon for contracts such as tenancy agreements to contain a liquidated damages clause, which is a genuine pre-estimate of the landlord's losses should the agreement be ended prior to the expiry of the fixed term. Although this term is apparently designed to serve as a liquidated damages clause, its provisions are uncertain. Rather than referring to a breach of the "term" of the lease, which would clearly indicate the length of time to which the parties are contractually bound, the clause refers to the "terms" (plural) of the lease, which may refer to either the length of time or may refer to any of the terms such as payment of rent, the requirement to end the tenancy via written notice, or the number of occupants permitted.

The clause is also unclear in that rather than being a genuine pre-estimate of loss, which one would expect to be a fixed sum, it lists a number of charges which may be levied, including tax without defining which if any of the charges is taxable.

It would be unconscionable to force the tenant to pay liquidated damages if he breached any term of the agreement as not all terms would result in a loss to the landlord.

The law of contract requires that terms be certain and readily understood. Where terms are uncertain, the doctrine of *contra proferentem* resolves the unclear term in favour of the party who did not draft the contract, which in this case is the landlord.

I find that the clause in question is not sufficiently clear so as to be binding on the tenant and I further find that the clause is worded in such a way as to impose a penalty. Residential Tenancy Policy Guideline #4 re-states the common law on the issue of liquidated damages and provides that where a liquidated damages clause is designed to penalize, it is not enforceable.

Although the tenant should have read the tenancy agreement that was presented to him at the time he moved into the second rental unit, I accept that he thought it was simply a formality and that the terms of the previous agreement would continue to apply. I find it more likely than not that B.D. did not specifically advise the tenant that he was signing a new fixed term lease. I have arrived at this conclusion for a number of reasons. B.D. did not hold the tenant to the fixed term under the previous tenancy agreement and I find it likely that if he would have explained to the tenant that he was requiring a new fixed term, the tenant would have engaged in some discussion on that point as he was under the understanding that the tenancy was being transferred from one unit to another. Also, the security and pet deposits were transferred from one unit to another and I find it more likely than not that the parties tacitly agreed that the fixed term would also transfer from one unit to another.

For these reasons, I find that the landlord is not entitled to the \$300.00 claimed and I dismiss the landlord's claim. I award the tenant the security deposit and I order the landlord to return the deposit to the tenant forthwith. I also find that the tenant is entitled to recover the \$50.00 filing fee paid to bring his application and I award him \$50.00.

### Conclusion

The landlord's application is dismissed and the tenant is awarded \$350.00. I grant the tenant a monetary order under section 67 for this sum. This order may be filed in the Small Claims Division of the Provincial 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*.

Dated: August 14, 2013

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Residential Tenancy Branch

