



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes:

MNDC, MNSD, MNR, FF.

Introduction

This hearing dealt with applications by the landlord and the tenant, pursuant to the *Residential Tenancy Act*. The landlord applied for a monetary order for loss of income, liquidated damages, cost of repairs and cleaning and the filing fee. The landlord also applied to retain the security deposit in partial satisfaction of her claim. The tenants applied for the return of the security deposit and for the filing fee.

Both parties attended the hearing and were given full opportunity to present evidence and make submissions. The tenants acknowledged receipt of evidence submitted by the landlord and both parties gave affirmed testimony.

Issues to be decided

Is the landlord entitled to a monetary order for loss of income, liquidated damages, repairs and the filing fee? Is the tenant entitled to the return of the security deposit and the filing fee?

Background and Evidence

The tenancy started on September 01, 2012, for a fixed term of one year ending August 31, 2013. The monthly rent was \$1,095.00 payable on the first of each month. The tenant paid a security deposit of \$547.50. A copy of the tenancy agreement was filed into evidence. An addendum to the agreement contains a clause that states "*If the tenants decide to break the lease prior to the 12 months expiration date of August 31, 2013, the tenants will be penalized by half month's rent which is equivalent to \$547.50.*"

On March 01, 2013, the tenant gave the landlord written notice to end the tenancy effective April 30, 2013. The landlord stated that she received it on March 04, 2013. The landlord stated that she advertised the availability of the rental unit on popular websites on March 15 and let the advertisement run up to March 21, 2013.

The landlord further advertised on March 23 until March 27, 2013. The landlord stated that she did not have any showings in March. The landlord testified that she left the country on March 30 and returned on May 17, 2013. Upon her return, she resumed advertising the rental unit and found a tenant for June 15, 2013. The landlord did not file proof of having advertised the availability of the rental unit.

In the absence of the landlord, her agent conducted a move out inspection with the tenants on April 28, 2013. Some discrepancies were reported. The tenant testified that the section of the form that states "*Damage to the rental unit for which the tenant is responsible*" remained blank at the time they signed the inspection form. However, upon her return, the landlord filled out this section and filed a copy of this amended report into evidence. The tenant also pointed out that certain sections in the report which were originally ticked off as "good" were changed to "damaged".

The tenants did not provide a forwarding address to the landlord. When the tenants did not receive the security deposit, on June 06, 2013 they filed an application for dispute resolution for the return of the deposit.

The landlord applied for the cost of repairs and cleaning and provided photographs and receipts to support her claim. In her claim for damages the landlord is claiming the cost of replacing bulbs in the entire unit. She stated that the tenants had installed bulbs which were "wrong". The landlord did not return the tenants' bulbs to the tenants.

The landlord is claiming the following:

1.	Liquidated damages	\$547.50
2.	Loss of income for May 01 – June 15, 2013	\$1,642.50
3.	Repairs and cleaning	\$447.69
4.	Filing fee	\$50.00
	Total	\$2,687.69

Analysis

Landlord's application:

1. Liquidated damages - \$547.50

Residential Tenancy Policy Guideline #4 deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of 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 and the wording of the clause.

In this case a clause in the addendum attached to the tenancy agreement states "If *the tenants decide to break the lease prior to the 12 months expiration date of August 31, 2013, the tenants will be penalized by half month's rent which is equivalent to \$547.50.*"

Based on the wording of the above clause, I find that it is a penalty clause and therefore, I dismiss the landlord's claim for liquidated damages.

2. Loss of income for May 01 – June 15, 2013 - \$1,642.50

Section 45(2) of the *Residential Tenancy Act* states that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that:

- (a) Is not earlier than one month after the date the landlord receives the notice
- (b) Is not earlier than the date specified in the tenancy agreement as the end of the tenancy and
- (c) Is the day before the day in the month on which the tenancy is based that rent is payable under the tenancy agreement.

In this case the tenant gave notice on March 04, 2013 to end the tenancy effective April 30, 2013, thereby ending the fixed term tenancy prior to the end date of the fixed term. Therefore the tenant did not comply with the terms of the tenancy agreement

Section 7 of the Act provides:

Liability for not complying with this Act or a tenancy agreement

7 (1) *If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

(2) *A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.*

Based on the landlord's testimony, I find that the landlord made minimal efforts to find a tenant in March and made no efforts for the period of March 30 to May 17, 2013. The landlord did not file any evidence to support efforts she made to find a new tenant. Based on the testimony of the landlord I find that the landlord did not make reasonable efforts to mitigate her losses and therefore is not entitled to the loss of income she suffered.

3. Repairs and cleaning - \$447.69

At the time the move out inspection was conducted, the agent for the landlord did not indicate to the tenants, that they were responsible for any damages. This section of the report was blank at the time the tenants signed the report. Therefore it was reasonable for the tenants to expect that the landlord would return the security deposit.

The move out inspection is an opportunity for the tenant and landlord to identify damage and come to an agreement on any deductions that can be made to the security deposit. The inspection should be conducted diligently and is the only opportunity to identify damage that the tenant is responsible for.

Since the testimony of both parties is conflicting with regard to the extent of the damage, I will use the move out inspection report which is evidence filed by the landlord to assess the damage that the tenant is responsible for.

In this case, the damage that the tenant is responsible for was filled out by the landlord, after the tenants signed the report. In addition, the report contained other changes that were overwritten and not initialed by the tenants. Accordingly, I find that the inspection report was amended to indicate that the tenants were liable for damage after the tenants signed in agreement and without the consent of the tenants. Therefore I must dismiss the landlord's monetary claim for the cost of repairs and cleaning.

4. Filing fee - \$50.00

Since the landlord has not proven her case, she must bear the cost of filing her application.

Tenant's application:

The tenants did not provide their forwarding address to the landlord and therefore the landlord had no way of knowing where to send the deposit to. If the tenants had provided a forwarding address, they would not have had to make application. Therefore they must bear the cost of filing their application.

The landlord has not proven an entitlement to deductions off the security deposit and must therefore return the security deposit in the amount of \$547.50 to the tenant within 15 days of receipt of this decision. Accordingly, I grant the tenant an order under section 67 of the *Residential Tenancy Act* for this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

Conclusion

I grant the tenant a monetary order in the amount of **\$547.50**.

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: September 11, 2013

Residential Tenancy Branch

