



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Bayside Property Services Ltd  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNR, MNSD, FF

### Introduction

This hearing was convened by way of conference call in response to the landlord's application for a Monetary Order for unpaid rent; for an Order permitting the landlord to keep all or part of the tenant's security deposit; and to recover the filing fee from the tenant for the cost of this application.

The tenant and landlord attended the conference call hearing, gave sworn testimony and were given the opportunity to cross examine each other on their evidence. The landlord and tenant provided documentary evidence to the Residential Tenancy Branch and to the other party in advance of this hearing. The parties confirmed receipt of evidence. All evidence and testimony of the parties has been reviewed and are considered in this decision.

### Issue(s) to be Decided

- Is the landlord entitled to a Monetary Order to recover unpaid rent, and a fee for breaking the lease?
- Is the landlord permitted to keep the security deposit?

### Background and Evidence

The parties agree that this tenancy was due to start on January 01, 2013 for a six month fixed term tenancy. The tenant signed the tenancy agreement and paid the first month's rent and a security deposit of \$537.50. A key deposit and a garage remote deposit were also paid but these have been returned to the tenant. Rent for this unit was agreed at \$1,075.00 plus \$25.00 for parking per month. Rent was due on the 1<sup>st</sup> of each month. The landlord testifies that the tenant verbally told the landlord on January 03, 2013 that he could not move into the unit due to the tenant's fear of heights which caused the tenant to have a severe panic attack on January 02, 2013. The tenant requested a unit on a lower floor but it was explained to the tenant that if this request was accommodated and the original unit could not be re-rented then the tenant would have to pay rent for both units for that month. The tenant declined this offer and sent the landlord a notice to vacate the unit on January 08, 2013.

The landlord testifies that they had a running advertisement for the unit along with another vacant unit. This advert started on December 28, 2013 and was renewed throughout January and February. The landlord testifies that eventually they had to drop the price on this unit to \$995.00 with six months free parking in order to get it rented. The unit was re-rented for March 01, 2013. The landlord seeks to recover a loss of rent for February, 2013 of \$1,100.00.

The landlord testifies that the tenancy agreement contains a Lease Break clause that states: "to terminate this lease prior to the expiry date of July 01, 2013 the tenant will be required to pay \$500.00 and must give one calendar months notice. The tenant agrees that the lease breaking sum may be deducted from the security deposit or otherwise be paid." The landlord testifies that as the tenant did terminate the lease early and did not give one months notice then the landlord seeks to recover \$500.00 from the tenant.

The landlord testifies that the tenant saw the unit three times prior to signing the tenancy agreement and again when the move in inspection was done. The tenant did

say that he had a fear of heights but decided that he could manage living in this higher unit and so decided to sign the lease agreement and move in.

The landlord testifies that they did not receive the tenant's forwarding address in writing until July 28, 2013 and at that time they returned the tenant's deposits for the keys and remote. The landlord seeks to keep the security deposit to offset against the loss of rent.

The tenant testifies that he was moving some items into the unit on January 02, 2013 and experienced a severe panic attack which came on suddenly and could not be prevented. The tenant realized he would not be able to live in the unit and so spoke to an agent of the landlord on January 03, 2013. The tenant testifies that he asked what would be necessary to change the terms of the lease agreement to rent a unit on a lower floor due to the mitigating circumstances. The landlord agreed but wanted the tenant to pay rent on both units if the higher unit could not be re-rented. The tenant testifies as he could not afford to do this he declined and then gave notice on January 08, 2013.

The tenant testifies that when he had first viewed the unit he felt anxiety about the height but thought he would be able to manage this. The tenant has provided a letter from his doctor giving an explanation of the tenant's anxiety and fear of heights.

The tenant disputes the landlord's claim for a loss of rent for February as the tenant feels the landlord did not mitigate the loss by trying to re-rent the unit as quickly as possible. The tenant has provided copies of advertisements and states that the advert posted on December 28, 2012 was not renewed daily in order for it to go to the top of the list for prospective tenants to see. This advert does not appear to have been renewed until January 21, 2013. If the landlord had been more proactive then they may have been able to re-rent the unit for January 15, 2013.

The tenant testifies that he had told the landlord on January 31, 2013 that any correspondence could be sent to an address the tenant was staying at that the landlords had on the application for rent. The tenant agrees that this address was not given in writing.

The tenant testifies that when he signed the lease he asked the landlord for the keys on December 28, 2012. However the landlord did not return the tenant's calls in the Christmas week and the tenant was not able to get into the unit until December 31, 2013. The tenant testifies that had he been able to get into the unit sooner he may have come to the realization that he would not be able to live there and then could have provided written notice in time.

The landlord testifies that as a company they did not repost adverts for unit every day. Adverts are renewed and then reposted when that runs out. The landlord testifies that they did show the unit to four or five prospective tenants but these viewings were unsuccessful.

The landlord testifies that the tenants lease started on January 01, 2013. The tenant was allowed to move in a day sooner on December 31, 2012 and a move in inspection was done on that date without incident.

### Analysis

I have carefully considered all the evidence before me, including the sworn testimony of both parties. I refer the parties to s. 45(2) of the *Act* which states:

*(2) 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, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.*

While I have some sympathy with the tenant's condition, I find the tenant did enter into this tenancy agreement in good faith knowing that he had a fear of heights. While the panic attack may have been unforeseen the tenant should have considered before signing the agreement that his fear may become worse once he was at the rental unit. The landlord cannot be held responsible for this fear as they also entered into the agreement with the tenant in good faith that the tenant would reside in this unit for at least six months. It is my decision that the landlords took the required steps in advertising the unit to mitigate the loss of rent for February however the unit did not rent and the landlord is entitled to recover a loss of rent from the tenant to put the landlord in the same position as if the tenants had not breached the agreement. Consequently, the landlord is entitled to a Monetary Order for the amount of **\$1,100.00** pursuant to s. 67 of the *Act*.

With regard to the landlord's claim for \$500.00 for a lease break fee; the tenancy agreement does not stipulate that this fee is a fee for liquidated damages nor does it inform the tenant that it is a genuine pre-estimate of costs incurred should the tenant break the lease. Instead it states that this is a lease breaking sum which may be deducted from the security deposit or otherwise paid. The Residential Tenancy Policy Guidelines # 4 states, in part, that a clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

The landlord has provided no evidence to show that this is a genuine pre-estimate of the loss incurred to re-rent the unit and I must deem therefore that this fee is therefore a

penalty and not liquidated damages. The landlord's claim to recover this fee from the tenant is therefore dismissed.

I Order the landlord to keep the security deposit of **\$537.50** pursuant to s. 38(4)(b) of the *Act*. This amount will be offset against the landlords claim for loss of rent. I further find the landlord is entitled to recover the **\$50.00** filing fee pursuant to s. 72(1) of the *Act*.

### Conclusion

I HEREBY FIND in partial favor of the landlord's monetary claim. A copy of the landlord's decision will be accompanied by a Monetary Order for **\$612.50**. The Order must be served on the respondent. Should the respondent fail to comply with the Order, the Order may be enforced through the Provincial Court 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: November 21, 2013

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Residential Tenancy Branch

