



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

This hearing dealt with a landlord's application for a Monetary Order for unpaid rent; damage or loss under the Act, regulations or tenancy agreement; and, authorization to retain the security deposit. Both parties appeared or were represented at the hearing and were provided the opportunity to make relevant submissions, in writing and orally pursuant to the Rules of Procedure, and to respond to the submissions of the other party.

Issue(s) to be Decided

1. Are the landlords entitled to recover unpaid rent and/or loss of rent from the tenant in the amount claimed?
2. Are the landlords entitled to a fee for breaking of the fixed term tenancy?
3. Are the landlords authorized to retain the security deposit?

Background and Evidence

The fixed term tenancy commenced May 1, 2013 and was set to expire on April 30, 2014. The tenant paid a \$400.00 security deposit and was required to pay rent of \$800.00 on the 1st day of every month. The tenant vacated the rental unit October 31, 2013. The landlord re-rented the unit for \$700.00 per month starting December 1, 2013.

By way of this application, the landlords are seeking to recover loss of rent of \$800.00 for the month of November 2013 and the rent differential of \$100.00 for one month only. The landlord's agent testified that he advertised the rental unit at \$800.00 for a couple of weeks after receiving the tenant's notice and there were a few viewings at that rate but not all of them were suitable tenants. The rental rate was dropped to \$700.00 so as to reach a deal with the most suitable prospective tenant willing to fulfill the remainder of the fixed term.

The landlords are also seeking a fee of \$300.00 from the tenant for breaking the fixed term. The landlords' agent pointed to the second page of the addendum to the tenancy agreement in support of this claim. The addendum provides for the following term: "A \$300 (Three Hundred Dollar) administration fee will be charged for early release."

The tenant acknowledged that the landlord's agent informed her of her obligation to pay rent if the unit was not re-rented. The tenant accepted her responsibility for paying rent for November 2013. The tenant intended to apply the security deposit to this obligation and wanted to make instalment payments for the remaining balance of \$400.00. The tenant sent her forwarding address to the landlord's agent via text message on December 6, 2013 with the understanding the agent was to send the tenant a payment agreement. The tenant also advised the agent that she could make payments starting at the end of January 2014. The tenant pointed to the screen shots of text messages exchanged between her and the landlords' agent.

The tenant submitted that a payment agreement was not received but then the tenant was served with the landlord's Application for Dispute Resolution. As such, the tenant was of the position she should not be required to pay the filing fee paid for this application. The landlords' agent acknowledged that he communicated to the tenant that he would send her a payment agreement. However, the landlords advised him not to send a payment agreement and instructed him to file an Application for Dispute Resolution so as to obtain a legally enforceable Monetary Order.

The tenant objected to paying the rent differential of \$100.00 as she was of the position she was not responsible for fluctuations in the rental market. With respect to the fee for breaking the lease, the tenant stated the second page of the addendum was not in the evidence package served upon her; however, she did not dispute that she may have signed a two-page addendum containing such a term.

Finally, the tenant was of the position she should be credited for double the security deposit since the landlords did not refund the deposit or file their Application for Dispute Resolution within 15 days of the tenancy ending.

Analysis

Upon consideration of everything presented to me, I provide the following findings and reasons.

Loss of Rent

When a tenant ends a fixed term tenancy before the expiry date, the tenant may be held responsible for paying rent for the remainder of the fixed term, provided the landlord takes reasonable action to mitigate the loss of rent. Where a landlord reduces rent to attract a replacement tenant such action may be seen as a reasonable measure to mitigate loss of rent. In other words, reducing the monthly rent may result in re-renting the unit sooner and avoiding further months of vacancy.

In the circumstances presented to me, I am satisfied the landlord's agent took reasonable action to re-rent the unit but that despite these efforts, the landlords suffered a vacancy for the month of November 2013 and reduced rent for the remainder of the fixed term. In recognition that the landlords limited their claim for the rent differential to one month, I grant landlords' a total award of \$900.00 for loss of rent [calculated as \$800.00 for November 2013 plus \$100.00 for one month of rent differential].

Fee for early end of tenancy

The subject term contained in the addendum indicates \$300.00 will be charged as "an administration fee for early release". The Residential Tenancy Regulations provide for fees a landlord may or may not charge. An administration charge for releasing a tenant from an obligation is not one of the permissible fees that a landlord may charge a tenant.

It is not uncommon for tenancy agreements to contain a liquidated damages clause and I have considered whether the subject term may be enforceable as a liquidated damages clause.

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable by the tenant in the event of a breach of the fixed term by the tenant. If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum unless the sum is found to be a penalty.

Section 6 of the Act requires that in order for a term of a tenancy agreement to be enforceable, the term:

- a. Must not conflict with the Act or the Regulations;
- b. Must not be unconscionable; and,
- c. Must be expressed in a manner that clearly communicates the rights and obligations under the term.

In reading the term in the subject term in the addendum I find it does not clearly express that the charge of \$300.00 represents a pre-determined estimate of the damages

payable in the event of a breach of the fixed term. Therefore, I do not consider the term to be a valid liquidated damages clause.

In light of the above, I find there is no basis under the Act to hold the tenant responsible for paying an “administration fee” of \$300.00 and I deny this portion of the landlord’s claim.

Filing fee

The Act provides that the Director, as delegated to an Arbitrator, may order one party to pay the other party the filing fee paid for their Application for Dispute Resolution. Such an order is made at the discretion of the Arbitrator. Upon hearing from both parties and reading the text messages exchanged between the landlords’ agent and the tenant, I make no order that the tenant pay the landlords for the filing fee. I find the tenant was agreeable to her obligation to pay rent for November 2013 and had a reasonable expectation that she would receive a payment agreement from the landlords’ agent but then she was served with an Application for Dispute Resolution without any further communication from the agent. I appreciate the landlords’ desire for a legally enforceable Monetary Order; however, in these circumstances I find it appropriate that they absorb the cost of pursuing this option.

Security deposit

I authorize the landlord to retain the security deposit in partial satisfaction of the award for loss of rent.

I have not doubled the security deposit as suggested by the tenant. Section 38 of the Act provides that a security deposit shall be doubled where the landlord fails to refund the security deposit or file an Application for Dispute Resolution claiming against the security deposit within 15 days of the later of the date the tenancy ended or the landlord received the tenant’s forwarding address in writing.

Section 88 of the Act provides for the ways a tenant must give the landlord a document. This would include a document containing a forwarding address. Sending a text message is not recognized as an acceptable method of giving the landlord a document. Therefore, I find the tenant had not given the landlord her forwarding address in writing and the landlord has not violated the above-described 15 day time limit imposed by section 38 of the Act.

Monetary Order

The landlords are provided a Monetary Order calculated as follows:

Loss of Rent	\$ 900.00
Less: security deposit	<u>(400.00)</u>
Monetary Order	\$ 500.00

To enforce the Monetary Order it must be served upon the tenant and it may be filed in Provincial Court (Small Claims) to enforce as an Order of the court.

Conclusion

The landlords have been authorized to retain the tenant's security deposit and have been provided a Monetary Order for the balance of \$500.00 to serve and enforce as necessary.

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: May 21, 2014

Residential Tenancy Branch

