



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNSD MNDC FF

### **Introduction**

This hearing dealt with an Application for Dispute Resolution by the landlord to obtain a Monetary Order in compensation for damage and to retain the security deposit in partial satisfaction of the claim. The landlord also seeks to recover the cost of the filing fee from the tenant for this application.

The applicant was present and participated in the hearing. Despite being served with the Notice of Hearing documents by registered mail sent on February 27, 2014, the respondent did not appear and the hearing was therefore conducted in the respondent's absence.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for "costs associated with the tenant defaulting on his lease"?

### **Background and Evidence**

The tenancy began on May 1, 2013 for a fixed term that was to expire on April 30, 2014. The tenancy was ended by the tenant effective February 28, 2014. The monthly rent was \$625.00 and a security deposit of \$312.50 was paid and is still being held by the landlord in trust for the tenant.

The landlord submitted into evidence a copy of the tenancy agreement, copies of communications, a copy of the signed move-in and move-out condition inspection report and a copy of the tenant's Notice to End Tenancy.

The landlord testified that the tenant terminated the tenancy agreement at the end of February, two months before the expiry of the fixed term. The landlord testified that they were successful in finding a replacement tenant to move into the unit effective March 1, 2014.

The landlord testified that, because the tenant had terminated the tenancy agreement prior to the fixed term, the tenant is required to pay \$312.50 to cover the costs of defaulting on his lease.

The landlord testified that his amount represents the cost of marketing, showing and re-renting the unit. The landlord submitted a fee breakdown that included \$65.61 for advertising, \$262.50 "Tenant Turnover fee" and \$24.67 for credit checks. No invoices nor receipts were submitted.

The tenancy agreement submitted by the landlord contains a term that states:

*"LEASE DEFAULT: Should the Tenant fail to take possession of the premises, or have abandoned or vacated the premises before the expiry of the tenancy created by this Agreement; the Tenant will automatically be responsible for all rent lost due to suite vacancy. There will also immediately become payable by the Tenant to the Landlord the sum of one half the current month's rent, including hst, which shall be paid to the Landlord as a service charge to cover the costs related to the changeover in tenancy. The Landlord reserves the right to deduct the above amount from the Tenant's security deposit."*

(reproduced as written including emphasis)

### **Analysis**

Section 7(1) of the Act provides that 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 the damage or loss which results. Section 7(2) also requires that the party making the claim for compensation for damage or loss which results from the other's non-compliance, must do whatever is reasonable to minimize the damage or loss.

The party applying for compensation for damages has the burden to prove their claim and in order to prove their claim the applicant must provide sufficient evidence to establish the following:

1. That the Respondent violated the Act, Regulation, or tenancy agreement; and
2. The violation resulted in damage or loss to the Applicant; and
3. Verification of the actual amount required to compensate for loss or to rectify the damage; and
4. The Applicant did whatever was reasonable to minimize the damage or loss

Section 58 of the Act states dispute resolution may be pursued in relation to the rights, obligations and prohibitions under the Act, or the rights and obligations under the terms of a tenancy agreement. In this instance, I find that the dispute before me relates specifically to terms of the tenancy agreement signed by both parties and I find that the damages being claimed by the landlord related to the tenant's alleged failure to fulfill the fixed term to its completion in violation of the agreement.

When a tenant and a landlord sign a fixed term tenancy contract, both are bound by the tenancy terms, including the obligation to continue the agreement to its expiry date, failing which the party responsible for prematurely ending the tenancy would be in violation of the agreement. They would therefore be liable, under section 7 of the Act, for any losses that flow from this violation.

In the case before me, I find that the tenant did violate the tenancy agreement by terminating the agreement prior to the end of the fixed term. However, I find that the suite was re-rented for the month immediately following the move-out date, with no vacancy and therefore no loss of revenue to the landlord.

Awards for damages are intended to be restorative, meaning the award should place the applicant in the same financial position had the damage not occurred. The landlord's position is that a term in the tenancy agreement requires the tenant to pay a fee for defaulting on the lease that represents the cost of re-renting the unit.

In regard to the "*lease default*" provision in the tenancy agreement, I find that the landlord apparently believes this to be equivalent to a liquidated damages clause.

According to the Residential Tenancy Guidelines, a liquidated damages clause is a clause in a tenancy agreement where the parties both agree in advance the amount of damages payable in the event of a breach of the tenancy agreement. Liquidated damages clauses are enforceable under the Act and the amount agreed to must be a genuine pre-estimate of the costs to re-rent, at the time the contract is entered into.

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.

I find 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.

Section 20(e) of the Act states that a landlord may not require, or include as a term of a tenancy agreement, that the landlord automatically keeps all or part of the security deposit or the pet damage deposit at the end of the tenancy agreement.

I find that the tenancy contract before me does contain wording in the paragraph dealing with the lease default fees to indicate that the tenant's security deposit will be automatically forfeited if the tenant fails to complete the fixed term.

In addition to the above, I find that no specific monetary amount is stated as liquidated damages and the "lease default" tenancy term categorizes the fees to be paid or surrendered as "*a service charge*". The Act does not permit a landlord to impose service charges in addition to rent.

Section 6(3) of the Act states that a term of a tenancy agreement is not enforceable if ; (a) the term is inconsistent with this Act or the regulations, (b) the term is unconscionable, or (c) the term is not expressed in a manner that clearly communicates the rights and obligations under it.

In light of the unclear and noncompliant term in the contract relating to the triggering of the liquidated damages, I find that this provision in the agreement cannot be enforced and based on section 6(3)(c) of the Act, I dismiss the landlord's claim for \$312.50 as lease default fees or liquidated damages.

Based on the evidence before me, I hereby dismiss the landlord's application in its entirety without leave to reapply.

I hereby grant the tenant a monetary order for the full refund of the tenant's security deposit in the amount of \$312.50. This order must be served on the Respondent and may be filed in the Provincial Court (Small Claims) and enforced as an order of that Court.

### **Conclusion**

The landlord is not successful in the application and the application is dismissed. The landlord is ordered to refund the tenant's security deposit forthwith.

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: July 3, 2014

