



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

### **Dispute Codes**

MNSD, MNR, MNDC, FF

### **Introduction**

This hearing was convened in response to an application by the landlord for a monetary order for unpaid rent / loss of revenue, damages, and to retain the security deposit in partial satisfaction of their monetary claim, and to recover the filing fee.

Both parties participated in the hearing with their submissions, document evidence and relevant testimony during the hearing. The parties were also provided with an opportunity to settle their dispute. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

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

Is the landlord entitled to a monetary order, and if so, in what amount?

### **Background and Evidence**

The *relevant* undisputed testimony in this matter is that the tenancy started as a fixed term tenancy agreement April 01, 2013 for one year with an effective end date of March 31, 2014 – although the tenant vacated earlier than agreed on August 01, 2013: installing a replacement tenant in the rental unit, and preparing a new tenancy agreement with the replacement tenant as of August 01, 2013. The monthly rent payable under the fixed term tenancy agreement was \$1500.00. At the start of the tenancy the landlord collected a security deposit and pet damage deposit which the parties agree the landlord has returned to the tenant in its entirety, therefore this portion of the landlord's claim is preliminarily dismissed.

The parties exchanged e-mail communication in June 2013 in which the tenant informed

the landlord that due to “sudden and unforeseen” circumstances they could no longer afford to pay the rent and would be vacating to more affordable accommodations. The landlord expressed degrees of concern over the news as the landlord was in the United States attending studies and left in a financial bind. The landlord informed the tenant to immediately place an advertisement for a replacement tenant to stem losses. The tenant proceeded on this plan, found a tenant for August 01, 2014 and completed a tenancy agreement for \$1600.00 per month and also conducting a move in condition inspection and requisite report with the replacement tenant – all under the name of the applicant landlord – after which they vacated the rental unit August 01, 2014. The tenant claims they acted on the instructions of the landlord during every step so as to provide a seamless revenue stream for the landlord while achieving their goal of leaving to more affordable accommodations. The tenant claims their actions did not constitute a sublet of the unit, but rather the landlord, by their permissions and acceptance of rent from another renter ended their fixed term tenancy in favour of a new tenancy, which the tenant simply facilitated. In this course the tenant did not place their name on any document and determined they themselves did not rent the unit to someone else, but rather only acted as the landlord’s agent in and for the landlord.

The landlord testified that the respondent tenant installed a replacement tenant into her rental unit in haste so as they could recover their deposits and vacate to avoid paying the agreed rent as it was no longer affordable. The landlord claims they did not authorize the replacement tenant as a new tenancy, and that the respondent acted solely in their own interest. The landlord testified they did not authorize an end to their fixed term tenancy but simply instructed the tenant to seek another renter to mitigate losses for the tenant and consequently for themselves. The landlord testified that at no time did they release the tenant from their responsibility under the fixed term lease. The landlord’s intent was also to ensure a revenue stream and expecting the tenant to abide by their fixed tenancy agreement. The landlord’s principal issue is that the tenant did not take more comprehensive measures to ensure the tenant they installed was more mindful of their home and property.

The landlord claims the new occupant of their rental unit paid the new rent of \$1600.00 per month for the first 2 months then stopped paying rent for 2 months thereafter until they were evicted in November 2013. The landlord claims that the rental unit remained vacant for December 2013 and January 2014, which was then re-rented for \$1600.00 per month through the remainder of the original fixed term. The landlord claims loss of revenue for October 2013 to January 2014. The landlord further seeks to now enforce a term of the tenancy agreement which claims that the security deposit will be forfeited if the fixed term tenancy is terminated prior to the end date. Specifically;

16. A liquidated damages clause in the amount of CAD 1500 is to be kept out of the deposit if lease is terminated before the term is matured.

However, the landlord testified they returned the tenant's deposit.

Additionally, the landlord seeks damages of \$2000.00 purportedly caused by the replacement tenant during their occupation of the rental unit, unpaid utilities, and dumping and cleaning costs. The respondent tenant claims they should not be responsible as they did not cause the claimed damage.

### **Analysis**

Under the *Act*, the party claiming a loss bears the burden of proof. Moreover, the applicant must satisfy each component of the following test established by Section 7 of the *Act*, which states;

#### ***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.*

In relevance to this matter, the test established by **Section 7** is as follows,

1. Proof the loss exists,
2. Proof the loss was the result, *solely, of the actions of the other party (in this matter the tenant)* in violation of the *Act* or Agreement.
3. Verification of the actual amount required to compensate for the claimed loss.
4. Proof that the claimant (landlord) followed section 7(2) of the *Act* by taking *reasonable steps to mitigate or minimize the loss.*

As a result, in this matter the landlord bears the burden of establishing their claim on the balance of probabilities. The landlord must prove the existence of the claimed loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the landlord must then provide evidence that can verify the actual monetary amount of the loss. Finally, the

landlord must show that reasonable steps were taken to address the situation and to *mitigate or minimize* the loss incurred.

A tenant, who signs a fixed-term tenancy agreement – effectively a contract - is responsible for the rent to the end of the term of the agreement / contract. And, a landlord who claims for a loss is subject to their statutory duty pursuant to **Section 7(2)** of the Act to do what *is reasonable to minimize the loss*.

On preponderance of all the evidence in this matter, I find that I prefer the evidence of the landlord. I find no evidence the landlord communicated with the tenant that they were ending the fixed term tenancy. I find the landlord communicated with the tenant their approval for the tenant to subletting the rental unit, and through their e-mail communications worked with the tenant to ensure a revenue stream on the basis the tenant informed they could not afford to pay the rent and were leaving. Despite their mutual efforts the landlord seeks for the tenant to fulfill their end of the contractual tenancy agreement. I further find that effectively the tenant sublet the rental unit to the replacement tenant / sub-tenant. I find that despite the tenant's portrayal of the sublet as a new tenancy by the landlord by including the landlord's name on all documents, the tenant authored and executed all instruments of the tenancy agreement with the sub-tenant, for the mutual benefit of herself and the landlord, but remained responsible to the landlord and obligated to fulfill the original tenancy agreement while the subtenant occupied the unit - to the end of the fixed term.

As the rental unit was occupied for October and November 2013, but no rent was received by the landlord, I find the landlord is owed the unpaid rent for these 2 months in the rent amount payable under the fixed term tenancy of \$1500.00 per month. From this owed amount I deduct the additional \$100 per month received by the landlord in August and September 2013, and February and March 2014: to the end of the fixed term tenancy - for a net award of **\$2600.00**.

The rental unit was vacant for December 2013 and January 2014, however, the landlord has not proven they mitigated the losses for these 2 months, or *did what was reasonable to minimize the loss* as required by Section 7(2) of the Act. As a result, I **dismiss** this portion of the landlord's claim, without leave to reapply.

I find that the landlord's term in the tenancy agreement purported to be a liquidated damages provision is not enforceable under the Act. For it to be so it cannot state that the security deposit will be forfeited, or portrayed as a penalty for breaching the lease. Such a provision must reflect that it is a true or genuine pre-estimate of costs incurred by the landlord in the event the lease is broken; otherwise it appears as excessive or

extravagant and unfair. As a result, **I dismiss** this portion of the landlord's claim, without leave to reapply.

I find that the landlord's claim for damages and other costs fails to meet the test established by Section 7 of the Act. The landlord has not provided sufficient evidence Verifying the actual amount required to compensate for the claimed damages, or proof that they followed section 7(2) of the *Act* as to *reasonable steps taken to mitigate or minimize the claimed losses*. As a result, I must **dismiss** this portion of the landlord's claim, without leave to reapply.

As the landlord has been partially successful in their claim they are entitled to recovery of their \$100.00 filing fee for a total award of **\$2700.00**.

### **Conclusion**

The landlord's application has been granted in part, and the balance of all other claims has been dismissed, without leave to reapply.

**I grant** the landlord an Order under Section 67 of the Act for the amount of **\$2700.00**. If necessary, this Order may be filed in the Small Claims Court and enforced as an Order of that Court.

**This Decision is final and binding on both parties.**

*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: June 02, 2014

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Residential Tenancy Branch

