



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNSD, MNDC, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for damage to the rental unit, and for money owed or compensation for damage or loss under the *Act*, regulation or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenant's pet damage and security deposits (the deposits) in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I waited until 10:58 a.m. in order to enable the tenant to connect with this teleconference hearing scheduled for 10:30 a.m. The landlord attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord testified that he sent the tenant a copy of his dispute resolution hearing package by registered mail on May 14, 2014. He provided the Canada Post Tracking Number to confirm this registered mailing. In accordance with sections 89(1) and 90 of the *Act*, I find that the tenant was deemed served with the above documents on May 19, 2014, the fifth day after their registered mailing.

At the hearing, the landlord withdrew his application for the recovery of his loss of rent for May 2014, as he was interested in obtaining a liquidated damage payment of \$1,000.00 as per the terms of section 5 of the Residential Tenancy Agreement (the Agreement) between the parties.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent, losses or damages arising out of this tenancy? Is the landlord entitled to retain all or a portion of the tenant's

deposits in partial satisfaction of the monetary award requested? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

This one-year fixed term tenancy began on October 1, 2013. Monthly rent was set at \$650.00, payable in advance on the first of each month. The landlord continues to hold the tenant's \$325.00 security deposit paid on September 20, 2013, and \$205.00 pet damage deposit paid on or about October 10, 2013. The landlord entered undisputed sworn testimony and written evidence that the parties conducted a joint move-in condition inspection on October 1, 2013, and a joint move-out condition inspection on April 25, 2014, the final day of this tenancy. The landlord entered into written evidence copies of reports of the above inspections.

The landlord testified that on or about April 15, 2014, the tenant gave her verbal notice that she intended to end her tenancy by April 25, 2014. The landlord testified that the tenant paid all of her April 2014 rent but has not paid anything further to the landlord to compensate him for his loss of rent for the remainder of her fixed term tenancy. The landlord testified that he was successful in re-renting the premises to another tenant as of July 1, 2014, for the same \$650.00 monthly rent as the tenant was previously paying.

The landlord's application for a monetary award of \$1,790.00 included the following:

Item	Amount
Loss of Rent May 2014	\$650.00
Liquidated Damages	1,000.00
Pet Damage to Yard	100.00
Vehicle Damage to Yard	100.00
Damaged Blinds	75.00
Missing Shower Curtain and Hanger	30.00
Repainting of Living Room	250.00
Removal of Stickers and Repainting of Back Door	75.00
Garbage Removal	40.00
Less Tenant's Deposits	-530.00
Total of Above Items	\$1,790.00

The landlord also requested the recovery of his \$50.00 filing fee for his application.

Analysis

Section 5 of the Agreement included the following provision for the payment of liquidated damages:

LIQUIDATED DAMAGES. *If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, or any subsequent fixed term, the landlord may treat this Agreement as being at an end. In such event, the sum of \$1,000.00 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty. Liquidated damages covers the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.*

The liquidated damages clause provided that if the tenant ended the tenancy before the end of the term she would pay to the landlord the sum of \$1,000.00, as liquidated damages and not as a penalty. I have considered Residential Tenancy Branch Policy Guideline 4. In the absence of any submission or evidence from the tenant to the contrary, I find that the liquidated damages provision in the Agreement does not constitute a penalty under the *Act* and represents a genuine pre-estimate of the loss estimated by the breach of the contract at the time the contract was drafted. While it would have been helpful had the landlord provided information to confirm the accuracy of the landlord's pre-estimate of the costs associated with finding new tenants, the tenant has not disputed the landlord's claim in this regard.

The Agreement purported to exclude amounts owed such as unpaid rent or for damage to the rental unit, (emphasis added), but it did not exclude loss of revenue. I regard loss of revenue, which is future rent that is not then owed, but may become payable, to be distinguishable from unpaid rent that is owed when the tenant ends the tenancy.

In contract law, the term "liquidated damages" refers to a genuine pre-estimate of the loss that will be suffered in the event of a breach of the contract. It is not used to describe some subset of damage that the landlord requires the tenant to pay, **in addition to** more general damages flowing from a breach of the contract.

In Elsley v. J.G. Collins Ins. Agencies, [1978] 2 SCR 916, Dickson J., speaking for the Court, described liquidated damages in the following terms:

It is now evident that the power to strike down a penalty clause is a blatant interference with freedom of contract and is designed for the sole purpose of providing relief against oppression for the party having to pay the stipulated sum. It has no place where there is no oppression. If the actual loss turns out to

exceed the penalty, the normal rules of enforcement of contract should apply to allow recovery of only the agreed sum. The party imposing the penalty should not be able to obtain the benefit of whatever intimidating force the penalty clause may have in inducing performance, and then ignore the clause when it turns out to be to his advantage to do so. A penalty clause should function as a limitation on the damages recoverable, while still being ineffective to increase damages above the actual loss sustained when such loss is less than the stipulated amount. As expressed by Lord Ellenborough in Wilbeam v. Ashton[23]: "Beyond the penalty you shall not go; within it, you are to give the party any compensation which he can prove himself entitled to." Of course, if an agreed sum is a valid liquidated damages clause, the plaintiff is entitled at law to recover this sum regardless of the actual loss sustained.

In the context of the present discussion of the measure of damages, the result is that an agreed sum payable on breach represents the maximum amount recoverable whether the sum is a penalty or a valid liquidated damages clause...

The landlord invoked the liquidated damages clause in the Agreement and elected to claim the liquidated damages amount shortly after this tenancy ended and possession of the rental unit was surrendered to the landlord. I find that by so doing the landlord has fixed the amount of damages to which the landlord is entitled at \$1,000.00.

I have also considered the landlord's application for a claim for damage to the rental unit arising during the course of this tenancy. In this regard, I note that section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/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 claimant must then provide evidence that can verify the actual monetary amount of the loss or damage. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

Although a comparison of the joint move-in and joint move-out condition inspection reports revealed some evidence that damage arose during this tenancy that exceeded reasonable wear and tear, the landlord provided no photographs or receipts to demonstrate his entitlement to the damage claim he was seeking. Other than his sworn testimony that he incurred costs as a result of the tenant's lack of care for the rental unit, the landlord provided little to support his claim. Despite this deficiency in the landlord's evidence, I do accept the landlord's undisputed sworn testimony and limited

written evidence that he did incur losses arising out of this tenancy as the tenant did not leave the rental unit “reasonably clean, and undamaged except for reasonable wear and tear” as is required by section 37(2)(a) of the *Act*. Under these circumstances and in accordance with sections 37(2)(a) and 67 of the *Act*, I find that the landlord is entitled to receive a monetary award of \$335.00, an amount representing one-half of the \$670.00 in damage claimed by the landlord.

I allow the landlord to retain the tenant’s deposits in partial satisfaction of the monetary award issued in this decision. No interest is payable over this period. As the landlord has been partially successful in his application, I allow the landlord to recover his \$50.00 filing fee from the tenant.

Conclusion

I issue a monetary Order in the landlord’s favour under the following terms, which allows the landlord to recover losses and damages arising out of this tenancy and his filing fee and to retain the tenant’s deposits:

Item	Amount
Liquidated Damages	\$1,000.00
Damage Arising out of Tenancy	335.00
Less Tenant’s Deposits	-530.00
Filing Fee	50.00
Total Monetary Order	\$855.00

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: September 15, 2014

Residential Tenancy Branch

