



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC, MNSD, O, FF

Introduction

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

- a monetary order 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 security deposit in partial satisfaction of the monetary order requested, pursuant to section 38;
- other unspecified remedies;
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

This hearing also dealt with the tenant's cross-application pursuant to the Act for:

- a monetary order for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, pursuant to section 67;
- authorization to obtain a return of all or a portion of her security deposit, pursuant to section 38;
- authorization to recover the filing fee for this application from the landlord, pursuant to section 72.

The tenant and her agent, TC (collectively "tenant") and the landlord attended the hearing and were each given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The tenant confirmed that her agent had authority to represent her and provide English language interpretation services for her at this hearing.

The landlord testified that he served the tenant with the landlord's amended application for dispute resolution hearing package ("Landlord's Application") on March 3, 2015, by way of registered mail. The tenant confirmed receipt of the Landlord's Application. In

accordance with sections 89 and 90 of the Act, I find that the tenant was duly served with the Landlord's Application.

The landlord confirmed receipt of the tenant's amended application for dispute resolution hearing package ("Tenant's Application"). In accordance with sections 89 and 90 of the Act, I find that the landlord was duly served with the Tenant's Application.

Issues to be Decided

Are the landlord and/or the tenant entitled to a monetary award for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary award requested?

Is the tenant entitled to a monetary award for the return of all or a portion of her security deposit?

Are the landlord and/or the tenant entitled to recover the filing fee(s) for their application(s)?

Background and Evidence

The landlord testified that this tenancy began on August 15, 2014 for a fixed term of one year to end on August 14, 2015. Monthly rent in the amount of \$2,050.00 was payable on the first day of each month. A security deposit of \$1,025.00 was paid by the tenant and the landlord continues to retain this deposit. The landlord provided a copy of the written tenancy agreement with his Application.

The landlord testified that the tenant vacated the rental unit on December 27, 2014, pursuant to an email that he received from the tenant on December 27, 2014. The landlord stated that he received the keys back from the tenant on this date as well. The tenant stated that she vacated the rental unit on December 24, 2014, as noted in her email of December 27, 2014. Both parties agreed that no move-in or move-out condition inspection reports were completed for this tenancy. The landlord stated that the tenant's forwarding address was received in writing on December 27, 2014.

Tenant's Application

The tenant seeks a monetary order of \$7,540.00 plus the \$100.00 filing fee for her Application.

The tenant seeks a return of her security deposit in the amount of \$1,025.00, as she stated that both parties agreed that there were no problems with the rental unit upon visual inspection with the landlord when she vacated. The tenant provided a copy of a note from the landlord, dated December 27, 2014, indicating that the rental unit was left in the same condition as when the tenant moved in. The tenant stated that she did not give the landlord written permission to retain any amount from her security deposit and that she provided her forwarding address to the landlord in writing on December 27, 2014.

The tenant seeks a return of her rent of \$2,050.00 for the period from December 14, 2014 to January 14, 2015, which she paid to the landlord. The tenant stated that she was required to leave the rental unit prior to the end of the fixed term in the tenancy agreement, due to the landlord's breach of a material term. The tenant stated that the rental unit was unliveable for the tenant and her two daughters because of a water leak and damage that was not due to the tenant's or the landlord's actions, beginning on December 14, 2014. The tenant stated that while the landlord attempted to fix the problem, he is still completing repairs as of the date of this hearing. The tenant indicated that the landlord brought in people to repair the water leak on the day that she complained of the issue.

The landlord provided written evidence in the form of an email, dated December 19, 2014, indicating that he immediately notified his building strata manager and learned that the water leak was due to a pipe leak above the tenant's rental unit. The landlord indicated that he attended at the rental unit two hours after the tenant reported the leak, arranged for a restoration company to address the leak immediately, had a plumber attend at the unit and had his parents assist the tenant with cleaning up the water leak. The landlord stated that he called his insurance company the next day to determine the repairs required, how long water drying fans had to remain in the unit, and how the landlord could assist the tenant. The landlord stated that he immediately notified the tenant to advise how long the repair process would take and to offer assistance to the tenant. The tenant indicated that the quote she received from the landlord's repair person on December 24, 2014, which she provided in her written evidence, indicated that the repairs could take 9 to 11 weeks total and that she should find alternative accommodation during this time.

The tenant testified that she suffered a loss of quiet enjoyment and a loss of use of her rental unit. The tenant indicated that the landlord brought in people to repair the unit,

causing a disturbance to the tenant and her children, as they constantly interrupted her quiet enjoyment and wore their shoes and soiled her flooring. The tenant stated that the landlord installed water drying fans in the rental unit, causing a loud noise that disturbed her and her children. The tenant also indicated that the fans were large and obstructive to her free movement in the unit. The landlord provided an email from the tenant, dated December 20, 2014, when the tenant asked the landlord to remove the drying fans from the rental unit and complete repairs after she moved out, so she could have peaceful, undisturbed holidays during this time. The tenant stated that she did not have full use of her rental unit including her bathroom and that she was told by the repair people to find alternate accommodation while the repairs were being performed. The tenant testified that she and her children suffered from health problems, including lack of sleep, anxiety, difficulty breathing, headaches and stress, due to the water damage in the rental unit. The tenant provided medical records for herself and her daughter, indicating that both were suffering from stress but their physical examinations were normal.

The landlord stated that he offered a comparable rental unit as an alternative accommodation where the tenant could live while repairs were being performed on her rental unit. The landlord offered the same terms as the tenancy agreement, including the same rent of \$2,050.00, despite the fact that this alternative unit usually costs \$200.00 more per month. The landlord stated that the tenant was still bound by the fixed term in the tenancy agreement, ending on August 14, 2015. The landlord stated that this alternative unit was the same layout and size as the tenant's rental unit, no renovations were occurring in that unit and it had a better view. The landlord indicated that the tenant viewed this place on December 17, 2014, 3 days after reporting the water leak. Both parties agreed that the tenant refused this alternative accommodation. The tenant stated that the landlord offered this unit as of January 1, 2015, which was too late, given that the water leak issue began on December 14, 2014 and given that the tenant moved out as of December 24, 2014. The landlord provided an email, dated December 19, 2014, indicating that another occupant was living in the rental unit until December 31, 2014 and that he had reserved this unit for the tenant until he received a response from her, despite the fact that other potential tenants were interested in the unit and were willing to put down security deposits to reserve it.

The tenant stated that she refused this alternative unit because the landlord refused to fix the creaking noises in the hardwood flooring or repair the balcony door that would not open. The tenant also indicated that there was a lot of noise and traffic in this alternative unit area, despite that it is on the 12th floor, because units on the 11th floor and below in the same building were undergoing repairs for water leak issues. The landlord stated that other tenants continued living in the same building with no problems while their units were undergoing repairs. The tenant indicated that she proposed

staying only until the end of June, not August 2015, in this alternative unit but that the landlord refused her offer. The tenant indicated that she wished to stay in a different country after the end of June 2015. The landlord also provided written evidence, in the form of an email he sent to the tenant on December 19, 2014, advising her that she could assign the tenancy to someone else, with the landlord's approval, for the balance of the fixed term. The landlord also advised the tenant that she could minimize her loss and avoid paying the rent owing for the remainder of the fixed term, by assigning her tenancy to another person.

The tenant stated that she was required to leave her rental unit quickly and find a new residence due to the water leak and damage. The tenant seeks \$250.00 for a move-in fee, which she had to pay when she moved into her new rental unit. The tenant provided a receipt from her new property manager to confirm her payment of this move-in fee. The tenant also seeks \$315.00 for moving expenses when she had to leave this rental unit. The tenant further seeks a rental loss of \$3,900.00 for 6 months of having to pay a higher rent in her new unit, as compared to this rental unit. The tenant indicated that she currently pays a monthly rent of \$2,700.00 rather than her previous monthly rent of \$2,050.00, an increase of \$650.00 per month. The tenant provided a copy of her new tenancy agreement for her new unit, which indicates that a fixed term tenancy was entered into from January 1 to June 30, 2015, for a monthly rent of \$2,700.00. The tenant redacted the name and signature of her new landlord as well as the address of her new unit, as she stated that she did not want the landlord in these applications to know this information because he is a real estate agent. The tenant stated that she did not have time to find a unit with a comparable rent to the \$2,050.00 she paid to this landlord, as she had to leave hastily, due to health issues with her and her children.

Landlord's Application

The landlord seeks a monetary order of \$15,375.00 plus the recovery of the \$100.00 filing fee for his Application.

The landlord seeks \$1,025.00 in liquidated damages, pursuant to clause 2 of the tenancy agreement. The clause states that if the tenant terminates the tenancy prior to the end of the fixed term, she is required to pay liquidated damages, which is not a penalty, as a service charge for costs including advertising, administration and re-renting the premises. The landlord stated that the tenant ended the fixed term tenancy prior to August 14, 2015, as she vacated on December 27, 2014. The landlord stated that the liquidated damages are to cover the administrative work to list the property online and to travel and show the property to potential tenants. The landlord indicated that this half month rental amount was a genuine pre-estimate of the loss at the time the

tenancy agreement was entered into, as it takes at least two weeks or more to find new tenants to occupy the rental unit.

The landlord also seeks \$14,350.00 for a loss of rent from January 15 to August 14, 2015. The landlord stated that the liquidated damages clause in the tenancy agreement indicates that the landlord is not precluded from claiming a loss of rental income, if liquidated damages are paid by the tenant. The landlord testified that the tenant paid rent until January 14, 2015. The landlord stated that the tenant did not provide any notice that she was vacating the rental unit, as she emailed the landlord after vacating. The tenant stated that she did not occupy the rental unit from December 25, 2014 until August 14, 2015, so she is not responsible to pay the landlord rent. The landlord stated that reasonable efforts were made to re-rent the rental unit after the tenant vacated on December 27, 2014. The landlord stated that he advertised the rental unit on one public website as well as his own personal social networking website, as well as sending emails and making phone calls. The landlord provided a copy of the online advertisements with his Application. The tenant stated that the personal website of the landlord would have reduced the exposure of the rental unit's availability, given that it could only be accessed by a select population of the landlord's friends and family. The landlord indicated that he works as a real estate agent and that he advised family and friends about the rental unit's availability. The landlord indicated that he has been showing the rental unit approximately one to two times per week to potential tenants. He stated that the winter months were a slow period for showing the rental unit and potential tenants are less likely to be searching for and attempting to rent a unit during this time.

The landlord stated that he listed the rental unit for the same monthly rental price as the tenant was paying of \$2,050.00 per month. The landlord indicated that he usually increases the rent in this rental unit by \$50.00 each year but that he did not attempt to do this when advertising the unit for re-rental. The landlord testified that he verbally offered the rental unit for a reduced rental of \$2,000.00 per month to one potential tenant but that person refused because the rental unit was too small. The landlord stated that he listed the rental unit for a fixed term of one year and not a shorter period of time, despite the fact that some potential tenants asked to rent the unit until June 2015, because he wants long term tenants. The landlord stated that he was agreeable to waiting until the summer 2015 months when the rental market was better for potential tenants, rather than reducing the price of the rental unit or offering a shorter fixed term lease. The landlord indicated that he has not had the rental unit vacant for this long, the longest period being approximately 2 months in the past. The landlord indicated that the repairs and renovations that he is completing in the rental unit to deal with water damage as well as to upgrade the unit, should be completed by the end of April 2015,

although there may be a delay as per the landlord's previous experience. The landlord stated that these repairs and renovations did not detract any prospective tenants from wanting to rent the unit. The tenant disputes the landlord's contentions, indicating that potential tenants would be detracted from renting the unit if it was under repair or damaged. The landlord indicated that after the tenant vacated the rental unit, he performed minor repairs for the water damage, including removing the inner wall of the bathroom, removing and replacing the tiles, and painting the area over the new drywall. The landlord also stated that he performed renovations, including replacing the cabinets and flooring and painting other areas of the rental unit in order to attract tenants.

Analysis

While I have turned my mind to all the digital and documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of both parties' claims and my findings around each are set out below.

Tenant's Application

Monetary Loss

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 or 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 tenant to prove, on a balance of probabilities, the following four elements:

1. Proof that the damage or loss exists;
2. Proof that the damage or loss occurred due to the actions or neglect of the landlord in violation of the *Act*, Regulation or tenancy agreement;
3. Proof of the actual amount required to compensate for the claimed loss or to repair the damage; and
4. Proof that the tenant followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I accept both parties' evidence that there was a water leak and water damage issues with respect to the tenant's rental unit. The landlord stated that the water issues were covered by the strata insurance for this building and that the water damage was found to be caused by a unit above the tenant's rental unit. The tenant agreed that the landlord immediately commenced the process of repairing the water damage and dealing with the issues, on the day that she complained. I find that the landlord addressed the water leak problem immediately and that the water damage was not due to the landlord's or the tenant's negligence. I find that the landlord fulfilled his obligations under section 32 of the *Act*, to ensure that the rental unit complied with health, safety and housing standards required by law and that the unit was suitable for occupation by a tenant, having regard to its age, character and location.

Although the tenant was advised to find alternative accommodation during these repairs and the repairs have been ongoing for a long period of time, the landlord offered the tenant comparable accommodation at the same rental price, for the duration of her fixed term tenancy agreement, in order to account for the repairs when the tenant could not live in the rental unit. I find that the tenant refused this alternative accommodation for unreasonable reasons, including creaky flooring and a dysfunctional balcony door. The tenant asked for repairs to be done by the landlord for the flooring and balcony door in this alternative unit, after complaining about noises from drying fans in her own rental unit, asking the landlord to remove the drying fans and delay repairs until after she moved out. Although the tenant claimed that the landlord did not offer this alternative accommodation early enough, as she said it was not available until January 1, the tenant did not leave the rental unit until December 24 or 27, 2014, a matter of days between the two dates. The tenant did not demonstrate that the alternative accommodation was unsuitable for habitation.

The tenant did not demonstrate that her own rental unit was uninhabitable due to the drying fans. After the landlord attempted to repair the problem and realized that the issue would take time to repair, I do not find that there was any unreasonable delay in the landlord's offer for the alternative accommodation to be made available as of January 1, 2015. Moreover, I find that the tenant was willing to move into the rental unit if the landlord reduced the fixed term length of the tenancy agreement, as the tenant wished to vacate at the end of June rather than August 14, 2015. Therefore, I find that the tenant's reasons for refusing this alternative accommodation had more to do with her renegotiating the fixed term end date rather than the availability date or the proposed repairs for this alternative accommodation. I find that the tenant did not minimize her loss by staying in the alternative accommodation offered, as per section 7(2) of the *Act*.

Accordingly, I dismiss the tenant's claim for a monetary order for loss in the amount of \$4,465.00, for moving expenses, a move-in fee and paying a higher rent in her new unit, without leave to reapply.

Both parties provided photographs and videos of the drying fans and the condition of the rental unit, with their respective applications. I find that the noises from the drying fans were very low and reasonable and the fans were placed strategically in the rental unit so that they would not obstruct the pathway or disturb the tenant. I find that the landlord tried to minimize the disturbance to the tenant, while ensuring proper repair could be made to the water damage. Accordingly, I find that the tenant is not entitled to a loss of quiet enjoyment as per section 28 of the *Act*, or the loss of the use of her rental unit due to the repairs being performed in the rental unit. The tenant was offered alternative accommodation to minimize the disruption and to compensate for loss of the rental unit, which she refused. I dismiss the tenant's claim for a monetary order of \$2,050.00 for return of her rent from December 14, 2014 to January 14, 2015, without leave to reapply.

Security Deposit

The tenant is not entitled to the return of double her security deposit, as the landlord filed his initial application for dispute resolution on January 1, 2015, within 15 days of the end of this tenancy and the tenant's provision of her forwarding address in writing. Although the absence of move-in and move-out condition inspection reports extinguished the landlord's right to claim against the tenant's security deposit for damage to the rental unit, as per sections 24 and 36 of the *Act*, the tenant's security deposit can be used to offset any monetary award given to the landlord in this decision, as per section 72 of the *Act*. I allow the tenant to recover her security deposit, subject to the offsetting provisions of section 72 of the *Act*.

As the tenant was mainly unsuccessful in her application, she is not entitled to recover the \$100.00 filing fee from the landlord.

Landlord's Application

Loss of Rent

I find that the landlord and tenant entered into a fixed term tenancy for the period from August 15, 2014 to August 14, 2015.

Subsection 45(2) of the *Act* sets out how a tenant may end a fixed term tenancy:

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.

The above provision states that the tenant cannot give notice to end the tenancy before the end of the fixed term. In this case, the tenant vacated the rental unit sometime between December 24 and 27, 2014, before the completion of the fixed term on August 14, 2015. As such, the landlord is entitled to compensation for losses he incurred as a result of the tenant's failure to comply with the terms of her tenancy agreement and the *Act*.

Section 7(1) of the *Act* establishes that a tenant who does not comply with the *Act*, the regulations or the tenancy agreement must compensate the landlord for damage or loss that results from that failure to comply. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

Based on the evidence presented, I accept that the landlord did attempt to the extent that was reasonable, to re-rent the premises soon after receiving written notice of the tenant's intention to vacate the rental unit. The landlord posted online rental advertisements two days after receiving notice from the tenant and provided copies of these advertisements. However, I find that the landlord has not attempted to fully minimize his losses. The landlord only advertised on one website and on a personal online social networking site which has limited access to select people. The landlord has not reduced the rental price of the rental unit or offered a shorter fixed term lease or a month to month tenancy, as incentives to try to attract potential tenants. The landlord also stated that he was willing to wait until the summer months, when he was confident that potential tenants will want to rent the unit when the rental season is busier, a delay well into the future as of the date of this hearing. The landlord turned down potential tenants who only wanted to rent the unit until June 2015. The landlord has also been performing a number of repairs and renovations, which would likely detract the number of potential tenants, given that the work needs to be completed and potential tenants may be wary of various problems with the rental unit. As such, I find that the landlord has failed to fully mitigate his losses under section 7(2) of the *Act*.

The landlord is claiming for 7 months of rental loss from January 15 to August 14, 2015, the period during which the property could not be re-rented due to the tenant's breach. The liquidated damages clause of the tenancy agreement addendum states that the landlord is not precluded from claiming a loss of rental income if liquidated damages are paid by the tenant. I find that the tenant breached the fixed term tenancy agreement, left without any notice to the landlord and that she is responsible for the losses suffered by the landlord. Accordingly, I find that the landlord is entitled to half a month's rent for the period from January 15 until February 28, 2015, totalling \$1,537.50. I make this finding on the basis that 1.5 months is a reasonable period of time to advertise, show and re-rent the rental unit. I also find that it is difficult to re-rent a unit in the middle of the month, when most prospective tenants begin their tenancies on the first day of the month and similarly when they are looking for a new place, they usually have to give one month's notice to leave. Therefore, I find that the landlord is entitled to a rental loss to the end of February 2015. I find that the landlord is only entitled to half a month's rent for this period because he failed to fully mitigate his losses, as noted above.

I also find that the landlord is entitled to one quarter of the monthly rent, \$512.50, for a failure to fully mitigate his losses for the period from March 1 to April 9, 2015, the date of this hearing. Accordingly, the landlord is entitled to \$666.25 total on a prorated basis for this period (\$512.50 for March 2015 loss of rent and \$153.75 for April 2015 loss of rent calculated at \$512.50/30 days in April x 9 days in April).

The landlord has leave to reapply for a monetary order for loss for the period from April 9, 2015 until August 14, 2015, if the landlord is still unable to re-rent the rental unit due to the tenant's breach of the fixed term tenancy agreement.

Liquidated Damages

A liquidated damages clause is a clause in a tenancy agreement where the parties agree in advance the damages payable in the event of a breach of the tenancy agreement. The amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may be held to constitute a penalty and as a result, will be unenforceable.

In this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting the rental unit after the tenants' breach. The cost of re-renting a rental unit to new tenants is part of the ordinary business of a

landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed-term tenancy agreement is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord incurs the costs of re-renting earlier than they would have without the breach. This exposes the landlord to extra costs of re-rental. For that reason, I find there is a loss to the landlord associated with the tenants' breach. The next question is whether the \$1,025.00 amount specified in the tenancy agreement addendum is a genuine pre-estimate of that loss.

The landlord stated that the liquidated damages of \$1,025.00 are to cover administrative costs to list the rental unit online and to travel and show the rental unit to potential tenants. I find that this amount is a genuine pre-estimate of the loss. The tenant breached the fixed term tenancy agreement, signed the tenancy agreement and specifically initialled on the bottom of each page of the agreement. Page 1 at clause 2 of the tenancy agreement discusses liquidated damages, stating that the tenant is responsible for this cost. Accordingly, I find that the landlord is entitled to \$1,025.00 for liquidated damages from the tenant.

Other Relief

The landlord continues to hold the tenants' security deposit of \$1,025.00. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

As the landlord was partially successful in his Application, I find that he is entitled to recover \$50.00 of the total \$100.00 filing fee paid for his Application, as he obtained a monetary award under \$5,000.00.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$2,253.75 against the tenant as follows:

Item	Amount
Loss of January 15 to April 9, 2015 Rent	\$2,203.75
Liquidated Damages	1,025.00

Less Security Deposit	-1,025.00
Recovery of Filing Fee for Landlord's Application	50.00
Total Monetary Award	\$2,253.75

The landlord is provided with a monetary order in the amount of \$2,253.75 in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

The Landlord's Application for other unspecified relief is dismissed, as no evidence was presented with respect to this Application.

The Landlord's Application for a monetary order for a loss of rent from April 9 to August 14, 2015, is dismissed with leave to reapply.

Although the tenant is entitled to obtain a return of her original security deposit, this deposit has been offset against the landlord's monetary award. The remainder of the Tenant's Application is dismissed without leave to reapply.

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: April 29, 2015

Residential Tenancy Branch

