



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding FRASER MARINE DRIVE HOLDINGS INC.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNDC, MNSD, FF

Introduction

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

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

The tenant did not attend this hearing, although I waited until 1350 in order to enable the tenant to connect with this teleconference hearing scheduled for 1330. The landlord's agent attended the hearing and was given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The agent confirmed that she had full authority to act on behalf of the landlord.

Preliminary Issue – Service

The agent testified that the landlord served the tenant with the dispute resolution package on 8 January 2015 by registered mail. The landlord provided me with a Canada Post tracking number that showed the same. On the basis of this evidence, I am satisfied that the tenant was deemed served with the dispute resolution package pursuant to sections 89 and 90 of the Act.

The agent testified that the registered mailing sent 8 January 2015 included all evidence submitted to me with the exception of the hydro bill dated 19 January 2015 in the amount of \$95.08. As this document was not served to the tenant, it is excluded from evidence. This portion of the landlord's claim is dismissed with leave to reapply.

Preliminary Issue – Amendment to Claim

At the hearing, the agent testified that the rental unit had been rerented as of 1 February 2015. As such, the agent asked to amend the landlord's claim to remove the rental loss for February. As there is no prejudice to the tenant in granting this amendment, it is allowed.

Issue(s) to be Decided

Is the landlord entitled to a monetary award for unpaid rent and losses arising out of this tenancy? 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 landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the agent, not all details of the submissions and / or arguments are reproduced here. The principal aspects of the landlord's claim and my findings around it are set out below.

This tenancy began 13 June 2014. The parties entered into a written tenancy agreement on 12 June 2014. The tenancy agreement provided that it was for in an initial rental period extending to 31 July 2015 after which it would be converted to a month-to-month tenancy. Monthly rent of \$750.00 was due on the first. The agent testified that the landlord continues to hold the tenant's security deposit in the amount of \$375.00, which was collected at the beginning of this tenancy.

The landlord provided me with a copy of the tenancy agreement and addendum. The tenancy agreement contains the following relevant clauses:

Clause 3 sets out that electricity is not included in rent.

Clause 4 is the liquidated damages clause:

If the Tenant...provides the landlord with notice...of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the Tenant will pay to the Landlord the sum of

\$375.00 as liquidate damages and not as a penalty. Liquidated damages are an agreed pre- estimate of the Landlord's costs of re-letting the rental unit and must be paid in addition to any other amounts owed by the Tenant, such as unpaid rent...

Clause 9 sets out that the utilities that are not included in rent are the responsibility of the tenant to maintain and pay.

On 1 January 2015, the tenant provided written notice of his intent to vacate the rental unit as of 13 January 2015. The agent testified that the tenant vacated the rental unit on 14 January 2015.

The agent testified that \$375.00 is the landlord's genuine pre-estimate of costs to re-rent the rental unit.

The agent testified that the tenant was told to put the hydro account into his name. He did not. The landlord continued to receive hydro bills for the tenant's use. The landlord reminded the tenant in late November of his obligation to transfer the utility into his name. The landlord provided me with one hydro bill that is in evidence. That invoice was dated 20 November 2014 in the amount of \$70.36.

The agent testified that the tenant did not pay rent on 1 January 2015. The agent testified that she approached the tenant on 2 January 2015 with the ledger and a demand for January's rent. The tenant told the agent that she could keep the security deposit in lieu of rent. The agent rejected this offer.

Analysis

In accordance with section 44 of the Act, a tenancy ends where:

- the landlord or tenant gives notice,
- the landlord and tenant agree; or
- the tenant abandons the rental unit.

I find that the landlord and tenant entered into a fixed term tenancy for the period 13 June 2014 to 31 July 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.

This means that a tenant cannot give notice to end the tenancy before the end of the fixed term. Subsection 26(1) of the Act sets out:

A tenant must pay rent when it is due under the tenancy agreement....unless the tenant has a right under this Act to deduct all or a portion of the rent.

As the tenant was occupying the rental unit as at 1 January 2015, the tenant was liable to rent for that period. The tenant was not entitled to apply his security deposit amount to rent without the landlord's written permission. The landlord did not supply any such permission. The earliest the landlord could have been reasonably expected to fill the vacant rental unit was 1 February 2015. The landlord did. I find that the landlord successfully mitigated its losses. As such the landlord is entitled to the full amount of rent for January, that is, \$750.00.

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 a tenant 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 landlords enter into fixed-term tenancy agreements 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 breach. The next question is whether the amount specified a genuine pre-estimate of that loss.

The agent testified that this loss is a genuine pre-estimate. This evidence was uncontested. I find that the liquidated damages amount is a genuine pre-estimate of the landlord's costs of re-rental. The landlord is entitled to liquidated damages in the amount of \$375.00.

The tenancy agreement provides that electricity costs are to be borne by the tenant. The tenant failed to transfer the utility into his name and thus the landlord incurred costs that it ought not to incur. The landlord has proven its entitlement to the amount of \$70.36 under the tenancy agreement.

As the landlord has been successful in this application, it is entitled to recover \$50.00 from the tenant for the filing fee.

The landlord applied to keep the tenant's security deposit. I allow the landlord to retain the security deposit in partial satisfaction of the monetary award. No interest is payable over this period.

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$870.36 under the following terms:

Item	Amount
Unpaid January Rent	\$750.00
Liquidated Damages	375.00
Unpaid Utility Bill	70.36
Recovery of Filing Fee for this Application	50.00
Offset Security Deposit Amount	-375.00
Total Monetary Order	\$870.36

The landlord is provided with this order in the above terms and the tenant(s) must be served with this order as soon as possible. Should the tenant(s) 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.

This decision is made on authority delegated to me by the Director of the Residential Tenancy Branch under subsection 9.1(1) of the Act.

Dated: May 01, 2015

Residential Tenancy Branch

