



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC, MNSD, FF

### Introduction

In the first application, by filing number, the landlords seek a monetary award for liquidated damages arguing that the tenant repudiated a fixed term tenancy. By amended claim they also seek unpaid February 2015 rent, utility costs and postage expenses.

In the second application the tenant seeks recovery of her \$425.00 security deposit, doubled pursuant to s. 38 of the *Residential Tenancy Act* (the "Act").

### Issue(s) to be Decided

Does the relevant evidence presented during the hearing show on a balance of probabilities that either party is entitled to any of the relief claimed?

### Background and Evidence

The rental unit is a two bedroom suite in a house. There are two other rental units in the house.

The written tenancy agreement show that the landlord is Ms. P.S.. It appears that the applicant/respondent Mr. A.R. is her husband and agent.

The tenancy agreement shows that the tenancy started October 24, 2014 and was for a fixed term of twelve months, ending October 23, 2015.

The monthly rent was \$850.00, due on the first of each month, in advance.

The landlord holds a \$425.00 security deposit.

For the landlord Mr. A.R. testifies that the tenant “abandoned” the premises without notice at the end of January 2015.

He says that her February rent cheque was dishonoured by her financial institution.

He says that he was able to find a new tenant for March 1, 2015 at the same rent.

He says that since the tenant left utility bills have come in. They have been sent to the tenant for payment of her share: \$66.00.

The landlord relies on a liquidated damages clause, clause 23, of an addendum to the tenancy agreement, which fixes an amount of \$900.00 in the event of the tenant's early termination of the tenancy.

The tenant testifies that on or about December 27, 2014 she emailed the landlord stating that she would be leaving. Unfortunately, neither party adduced a copy of that email. The tenant did adduce an email back from Mr. A.R. attaching a form of tenancy agreement and “tenant application” document indicating that once they were signed to send them to him and “[o]nce approved, we will send you a confirmation to allow you to sublet the unit.”

The tenant has filed a number of text messages between Mr. A.R. and her. None are dated. None were referred to during the hearing.

The tenant says that she moved out about January 24, 2015 and left a note with a forwarding address. She says new tenants were moving in on January 31<sup>st</sup> and that they had wanted to move in a week earlier.

The tenant filed a handwritten document, signed by her and dated January 31, 2015 to Mr. A.R. with her forwarding address.

It appears that the parties had discussions about resolving the matter for less than the full liquidated damages amount but there was no agreement.

Mr. A.R. responds that the tenant was still there on January 26<sup>th</sup>.

## Analysis

The *Act*, s. 45(2), provides,

- (2) 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 tenant was not entitled to give a one month notice in December 2014 to end her tenancy. A tenant who purports to end the tenancy before the expiry of the fixed term is in fundamental breach of the tenancy agreement. She is exposed to a claim by the landlord for damages. Residential Tenancy Policy Guideline 3 “Claims for Rent and Damages for Loss of Rent” provides,

Where a tenant has fundamentally breached the tenancy agreement or abandoned the premises, the landlord has two options. These are:

1. Accept the end of the tenancy with the right to sue for unpaid rent to the date of abandonment;
2. Accept the abandonment or end the tenancy, with notice to the tenant of an intention to claim damages for loss of rent for the remainder of the term of the tenancy.

These principles apply to residential tenancies and to cases where the landlord has elected to end a tenancy as a result of fundamental breaches by the tenant of the *Act* or tenancy agreement. Whether or not the breach is fundamental depends on the circumstances but as a general rule non-payment of rent is considered to be a fundamental breach.

If the landlord elects to end the tenancy and sue the tenant for loss of rent over the balance of the term of the tenancy, the tenant must be put on notice that the landlord intends to make such a claim. Ideally this should be done at the time the notice to end the tenancy agreement is given to the tenant. The filing of a claim for damages for loss of rent and service of the claim upon the tenant *while the tenant remains in possession of the premises* is sufficient notice. Filing of a claim and service upon the tenant after the tenant has vacated may or may not be found to be sufficient notice, depending on the circumstances. Factors which the arbitrator may consider include, but are not limited to, the length of time since the end of the tenancy, whether or not the tenant's whereabouts was known to the landlord and whether there had been any prejudice to the tenant as a result of the passage of time. The landlord may also put the tenant on notice of the intent to make a claim of that nature by way of a term in the tenancy agreement. However, where a tenant has abandoned the premises and the tenancy has ended with the abandonment, notice must only be given within a reasonable time after the landlord becomes aware of the abandonment and is in a position to serve the tenant with the notice or claim for damages.

The evidence shows that the landlord did not accept the tenant's abandonment. Mr. E.R.'s email of December 27th clearly indicates that he suggested that the tenant sublet her remaining interest under the lease. By subletting, the tenant would still remain the landlord's tenant and be responsible for rent to be paid directly to the landlord.

It may be that the landlord arranged for others to view the suite during the month of January 2015 but that is not, in my view, evidence of acceptance of the tenant's breach.

I find that the tenant left at the end of January and thereby breached the fixed term tenancy. I find that the landlord elected to pursue her for the rent for the remainder of the term. Given that the tenant was gone, the landlord's application for dispute resolution, made February 2, 2015 was sufficient notice of that election.

I accept that the landlord lost February rental income as a result of the tenant's breach and award the landlord \$850.00 in that regard.

The landlord relies on a liquidated damages clause contained in the addendum to the tenancy agreement. The clause reads,

**Early Termination:** The Tenants understand and agree that should the tenants want to move before the end of the fixed term tenancy, the Tenants will have to pay the rent until the end of the term unless the landlord agrees in writing that the tenants can end the tenancy early or can assign or sublet the unit, or if the landlord is able to mitigate the potential loss by renting out the premises. In the event of an early termination, the Tenants [*sic*] acknowledges and agrees that the sum of \$900.00 will be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the commission costs to re-renting the property. The Landlord and Tenants acknowledge and agree that the payment of liquidated damages will not preclude the Landlord from exercising any further right or pursuing [*sic*] another remedy available in law or in equity, including, but not limited to, damage to the rental unit or residential property, advertising costs, and damages as a result of lost rental income due to the tenant's breach of any term in this agreement. The Tenant is award in the event of an early termination, pursuant to this rental agreement, he/she is responsible for the monthly rental fee until such time as the Property has been re-rented to a qualified and suitable Tenant and a written rental agreement with such party has been entered into.

I find that the clause applies to the facts before me. The landlord is entitled to recover the \$900.00 liquidated damages amount in addition to her loss of rental income.

There is no dispute that the utility bills received after the tenant vacated the premises show that her share of those charges are \$66.00 and I award that amount to the landlord.

The tenant claims entitlement to a doubling of the security deposit. Section 38 of the *Act* mandates a doubling where a landlord fails to either repay a deposit or make an application against it within fifteen days after the end of the tenancy and receipt of a forwarding address in writing.

In this case the landlord application was made February 2<sup>nd</sup>, well within the fifteen day period after the tenancy ended according to either party's account. There will therefore be no doubling of the deposit.

Each side has claimed expenses incurred in pursuing and defending the claims made in this dispute. Those items are in the nature of "costs and disbursements" in the dispute resolution process and, as mentioned at hearing, an arbitrator's jurisdiction is limited to awarding the filing fee in that regard.

### Conclusion

The tenant's application is dismissed.

The landlord is entitled to a monetary award of \$1816.00 plus recover of the \$50.00 filing fee. I authorize the landlord to retain the \$425.00 security deposit in reduction of the amount awarded. There will be a monetary order against the tenant for the remainder of \$1451.00.

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 03, 2015

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Residential Tenancy Branch

