



Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding GEORGIAN HOUSE
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR, MNSD, MNDC, FF

Introduction

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

- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant, pursuant to section 72.

The tenant did not attend this hearing, which lasted approximately 33 minutes. The landlord's agent, BM ("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 confirmed that he is the manager for the landlord company named in this application and that he had authority to represent the landlord company as an agent at this hearing.

The landlord testified that the tenant was served with the landlord's application for dispute resolution hearing package ("Application") on December 18, 2014, by way of registered mail to the tenant's forwarding address provided in the tenant's letter to the landlord, dated November 3, 2014. The landlord provided a Canada Post tracking number verbally during the hearing, as proof of service. The landlord confirmed that he checked the tracking number and determined that the tenant received the package on December 22, 2014. In accordance with sections 89 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's Application on December 23, 2014, five days after its registered mailing.

The landlord seeks to amend the landlord's Application to increase the monetary order from \$5,000.00 to \$7,950.00 including the \$50.00 filing fee for its Application. The landlord indicated this amount in a separate monetary worksheet, which was provided by the landlord for this hearing (also "Application"). The landlord confirmed that he served this monetary worksheet to the tenant on June 26, 2015, by way of registered mail to the tenant's forwarding address. In accordance with sections 88 and 90 of the *Act*, I find that the tenant was deemed served with the landlord's monetary worksheet on July 1, 2015. Accordingly, I find that the tenant had notice of the landlord's increased monetary claim more than 14 days prior to this hearing, as required by Rule 3.14 of the Residential Tenancy Branch ("RTB") *Rules of Procedure*. Therefore, I amend the landlord's application pursuant to section 64(3)(c) of the *Act*, to consider the landlord's entire monetary claim of \$7,950.00 including the filing fee. The landlord confirmed that he did not pay the required \$100.00 filing fee for claims above \$5,000.00.

Issues to be Decided

Is the landlord entitled to a monetary award for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Regulation* or tenancy agreement?

Is the landlord entitled to retain 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

The landlord testified that this tenancy began on October 1, 2014 for a fixed term of one year. Monthly rent in the amount of \$1,295.00 was payable on the first day of each month. A security deposit of \$645.00 was paid by the tenant and the landlord continues to retain this deposit. The landlord provided a copy of the written tenancy agreement with its Application.

The landlord testified that the tenant vacated the rental unit on November 26, 2014. The landlord confirmed that he received a signed letter, dated November 3, 2014, on the same date from the tenant, which the landlord drafted for the tenant's signature. The letter states that the tenant intended to terminate her tenancy effective on November 30, 2014. The letter acknowledges that the tenant understood that she was responsible for paying the landlord a loss of rent until the end of September 2015, if the landlord was unable to re-rent the unit before that time. The letter indicates that the

landlord had not waived its right to claim liquidated damages from the tenant, by accepting that letter. The letter also provides the tenant's forwarding address in writing. The landlord indicated that a move-in condition inspection and report were completed on October 1, 2014 and signed by both parties. The landlord stated that a move-out condition inspection and report were completed on November 26, 2014, which was only signed by the landlord, not the tenant. The landlord provided a copy of both reports with its Application.

The landlord also seeks a loss of rent from December 2014 until April 2015, totalling \$6,475.00, during the time period when the rental unit was vacant. The landlord claimed that he was able to re-rent the unit to new tenants as of May 1, 2015 until the end of April 2016. The landlord provided a copy of the tenancy agreement made with the new tenants.

The landlord stated that the liquidated damages clause in the tenancy agreement indicates that the landlord can claim for a loss of rental income in addition to liquidated damages. The landlord testified that the tenants paid rent until November 30, 2014. The landlord stated that reasonable efforts were made to re-rent the rental unit after the tenant vacated on November 26, 2014. The landlord stated that the rental unit was listed for rent online on one website for the entire time that the unit was vacant. The landlord indicated that a sign was also posted in front of the rental building to advertise the unit. The landlord did not provide a copy of any advertisements. The landlord testified that the advertisements offered a fixed term tenancy, that no reduction in the rental price was made, and that no pets are allowed in this building. The landlord confirmed that photographs of the unit were provided in the advertisement and that the wording was changed periodically. The landlord explained that the rental unit was repainted and the floors were renovated in order to attract more potential tenants to view the unit. The landlord testified that the apartment was shown approximately 30-40 times before it was re-rented. The landlord maintained that the unit likely took longer to re-rent because it is hard to find potential tenants during the cold, winter months, that the unit is located on a lower level and there are trees and dark areas around the unit, making it less desirable. The landlord also stated that at the time, many other units were being advertised for cheaper rent of \$1,000.00 per month, in older framed buildings, which usually allowed children and pets.

The landlord seeks \$425.00 in liquidated damages, pursuant to clause 5 of the tenancy agreement. The landlord stated that the clause specifies \$800.00 for liquidated damages but that he was seeking a lesser, more reasonable amount, as advised by the RTB when he sought advice. 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 an agreed pre-estimate of the landlord's costs of re-renting the unit. The landlord stated that the tenant ended the fixed term tenancy prior to September 30, 2015, as she vacated on November 26, 2014. The landlord stated that the liquidated damages are a genuine pre-estimate of the costs of re-rental for the time and effort to attempt to re-rent the unit, as well as the posting of free online advertisements. The landlord testified that the tenant signed the above letter, dated November 3, 2014, that she provided to the landlord, indicating that she understood that the landlord could claim for liquidated damages for the early termination of the fixed term tenancy agreement.

The landlord also seeks \$350.00 for cleaning costs after the tenant vacated the rental unit, as well as \$5.00 for two new lightbulbs that the tenant failed to replace when she vacated. The landlord indicated the above items in the move-out condition inspection report, but did not indicate any estimated costs for same. The landlord did not provide receipts for the above costs. The landlord stated that the cleaning was done in-house by the landlord's agent and an assistant and therefore, no invoice or receipt was issued. The landlord confirmed that 10 hours of cleaning was completed at \$35.00 per hour for 2 people, totalling \$350.00.

The landlord seeks to offset any monetary order with the tenant's security deposit of \$645.00. The landlord initially applied for this amount in addition to the above amounts for loss of rent, liquidated damages, cleaning and light bulbs. However, the landlord confirmed that he only wished to use this deposit to offset against any possible monetary order.

Analysis

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

Loss of Rent

I find that the landlord and tenant entered into a fixed term tenancy for the period from October 1, 2014 to September 30, 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. If she does, the tenant could be liable to pay for a loss of rent to the landlord, in addition to liquidated damages. In this case, the tenant vacated the rental unit on November 26, 2014, before the completion of the fixed term on September 30, 2015. As such, the landlord is entitled to compensation for losses it 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 after receiving written notice of the tenant's intention to vacate the rental unit. The landlord posted an online rental advertisement and a sign in front of the rental building. However, I find that the landlord has not attempted to fully minimize its losses. The landlord only advertised on one website. The landlord did not reduce 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. As such, I find that the landlord has failed to fully mitigate its losses under section 7(2) of the *Act*.

The landlord is claiming for 5 months of rental loss from December 2014 until April 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 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, vacated without proper 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 a full month's rent for the period from December 1 to 31, 2014 in the amount of \$1,295.00 and a half month's rent from January 1 to 31, 2015 in the amount of \$647.50. I make these

findings on the basis that two months is a reasonable period of time to advertise, show and re-rent the rental unit. I have also taken into account the potential of re-renting during the winter months when the rental market may be slower and have accounted for the fact that the unit is located on the lower level of the building. I find that the landlord is entitled to a full month's rent for December 2014 because the landlord was entitled to at least one full month's written notice for the tenant to vacate the rental unit and only received notice on November 3, 2014 for the tenant to vacate effective on November 30, 2014. I find that the landlord is only entitled to half a month's rent for January 2015 because it failed to fully mitigate its losses, as noted above.

I dismiss the landlord's claim to recover rent of \$1,295.00 for each month for the period from February 1, 2015 until April 30, 2015, totalling \$3,885.00, without leave to reapply. I find that the landlord should have been able to re-rent the unit within a reasonable two-month period as noted above. I find that had the landlord attempted to decrease the rent or the fixed term period, that potential tenants would have been more likely to rent the unit at an earlier time than May 1, 2015.

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 tenant's 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 it 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 tenant's breach. The next question is whether the \$425.00 amount sought by the landlord is a genuine pre-estimate of that loss.

The landlord stated that liquidated damages of \$425.00 are to cover the advertising of the unit, as well as the time and effort involved in the process of re-renting. The landlord had to advertise, show the unit, engage in screening potential tenants, as well as the application and move-in process. I find that this amount is a genuine pre-estimate of the loss. Although the tenancy agreement indicates \$800.00 for liquidated damages, I accept that the landlord reduced his claim to a more reasonable amount. Accordingly, I find that the landlord is entitled to \$425.00 in liquidated damages.

Other Relief

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 and show the steps taken to minimize the loss or damage being claimed.

In summary, the onus is on the landlord 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 tenant 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 landlord followed section 7(2) of the *Act* by taking steps to mitigate or minimize the loss or damage being claimed.

I dismiss the landlord's claim for cleaning costs in the amount of \$300.00 and 2 light bulbs purchased for \$5.00, without leave to reapply. The landlord did not meet condition #3 of the test above, as he failed to provide any invoices or receipts for the claimed amounts. The landlord should have received a receipt for the purchase of the light bulbs and should have provided the receipt for this hearing. Although the landlord may not ordinarily issue invoices or receipts for cleaning because it is done in-house, there was no estimate of the cleaning costs in the move-out condition inspection report or in any other documentation, despite the fact that the landlord said that tenants are always charged the same standard amount for cleaning by the landlord. The landlord

only indicated \$355.00 for “suite cleaning” in its Application but did not give a breakdown of the amount of hours required to clean or the hourly rate.

The landlord continues to hold the tenants’ security deposit of \$645.00. 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 mainly successful in this Application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for the Application. Although the landlord applied for an amount above \$5,000.00, he did not pay the required \$100.00 filing fee and I did not award an amount above \$5,000.00 to the landlord.

Conclusion

I issue a monetary order in the landlord’s favour in the amount of \$1,772.50 against the tenant as follows:

| Item | Amount |
|---|-------------------|
| Loss of Rent from December 1 to 31, 2014 | \$1,295.00 |
| Loss of Rent from January 1 to 31, 2015 | 647.50 |
| Liquidated Damages | 425.00 |
| Less Security Deposit | -645.00 |
| Recovery of Filing Fee for this Application | 50.00 |
| Total Monetary Award | \$1,772.50 |

The landlord is provided with a monetary order in the amount of \$1,772.50 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.

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 23, 2015

Residential Tenancy Branch

