



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

**Dispute Codes:** *MNSD, FF*

### **Introduction**

On September 11, 2015, a hearing was conducted to resolve a dispute between these two parties. Due to issues with the service of evidence, the hearing was adjourned to be heard on this date – November 04, 2015.

The tenant has applied for a monetary order for the return of double the security deposit, for rent paid for March 2015 and for the recovery of the filing fee.

Both parties attended both hearings and were given full opportunity to present evidence and make submissions. The parties acknowledged receipt of evidence submitted by the other and gave affirmed testimony.

### **Issues to be decided**

Has the tenant established a monetary claim for the return of the deposit and for the filing fee?

### **Background and Evidence**

The tenancy began on October 01, 2014 for a fixed term of one year. The rent was \$1,050.00 due on the 1<sup>st</sup> of each month. Prior to moving in the tenant paid a security deposit of \$525.00.

A copy of the tenancy agreement was filed into evidence. The agreement contains a clause that states: *If the Tenant moved out prior to the natural expiration of this Lease, a re-rent levy of \$1,050.00 will be charged to the Tenant*

The parties agreed that on January 24, 2015, the tenant gave written notice to end the tenancy effective February 28, 2015. The landlord stated that she made efforts to look for another tenant by advertising the vacancy in the community, by word of mouth.

Prior to the end of tenancy, the landlord asked the tenant to pay rent for March to satisfy the clause in the tenancy agreement. The tenant agreed to allow the landlord to retain the security deposit of \$525.00 and provided the landlord with an additional cheque in the amount of \$525.00.

The tenant stated that after he moved out, he found that the rental unit was occupied in March. The landlord filed a letter from the new tenant confirming that she received the keys to the rental unit in the first couple of days in March and started moving her belongings into the unit on March 07, 2015. The new tenant stated that she moved in on March 15, 2015 but starting paying rent on April 01, 2015.

The landlord testified that she had suffered a loss of income because she did not receive rent for March from the new tenant.

### **Analysis**

Section 38 (4) of the *Residential Tenancy Act*, states that a landlord may retain an amount from the security deposit if at the end of the tenancy, if the tenant agrees in writing that the landlord may retain an amount to pay a liability or obligation of the tenant. As per the testimony of the tenant, the tenant agreed to allow the landlord to retain the deposit towards rent for March and to satisfy the liquidated damages clause in the tenancy agreement. Therefore the tenant is not entitled to the return of double the deposit.

In the tenancy agreement the landlord refers to the liquidated damages as a “*rerent levy*” and records the amount of the liquidated damages to be paid in the event the tenant ends the tenancy prior to the end date, as \$1,050.00 which is equal to the amount of one month’s rent.

Section 4 of the *Residential Tenancy Policy Guideline* addresses liquidated damages and states that the amount agreed to must be a genuine pre-estimate of the administrative costs of re-renting the unit, 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 considering whether the sum is a penalty or liquidated damages, an Arbitrator will consider the circumstances at the time the contract was entered into. One of the tests to determine if the clause is a penalty clause or a liquidated damages clause is that the sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach. Clauses of this nature can also be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

By her own testimony, the landlord indicated that she advertised the vacancy by word of mouth in the community and therefore did not incur expenses even close to the region of \$1,050.00, to re-rent the unit. Accordingly, I find that \$1,050.00 is extravagant compared to the administrative cost that the landlord would incur to re rent the unit.

Therefore I have determined that the liquidated damages clause is a penalty and accordingly is unenforceable and not valid.

In addition, based on the sworn testimony of the landlord, I further find that the landlord found a tenant for March. Even though the landlord stated that she did not collect rent from the new tenant. I find that by allowing a tenant to live rent free in the rental unit, the landlord took the rental unit out of the rental market for the month of March and did not attempt to mitigate her losses.

Based on the sworn testimony of both parties, I find that the tenant has established a claim for the return of \$1,050.00 that she paid to the landlord for “*rerent levy*” or for the loss of income that the landlord alleges that she suffered. Since the tenant has proven her case, I award her the recovery of the filing fee of \$50.00.

Overall the tenant has established a claim of \$1,100.00. I grant the tenant an order under section 67 of the *Residential Tenancy Act*, for this amount. This order may be filed in the Small Claims Court and enforced as an order of that Court.

### **Conclusion**

I grant the tenant a monetary order for \$1,100.00.

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: November 04, 2015

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Residential Tenancy Branch

