



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MND, MNDC, MNSD, FF

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for damages to the unit - Section 67;
2. A Monetary Order for compensation - Section 67;
3. An Order to retain the security deposit - Section 38; and
4. An Order to recover the filing fee for this application - Section 72.

The Landlord and Tenants were each given full opportunity under oath to be heard, to present evidence and to make submissions.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Background and Evidence

The following are agreed facts: The tenancy started on March 16, 2014 for a fixed term to end March 31, 2015. At the outset of the tenancy the Landlord collected \$750.00 as a security deposit. Rent of \$1,500.00 was payable monthly. On February 20, 2014 the Parties entered into an agreement to extend the fixed term tenancy to March 31, 2016. In May 2015 the Landlord served the Tenant with a 10 day notice to end tenancy for unpaid rent with an effective date at the end of May 2015. The Tenants moved out of the unit on June 1, 2015 and returned the keys to the unit on June 2, 2015. No rent is

owed for May 2015. The Tenant provided its forwarding address on the move-out condition report for the inspection conducted June 4, 2015.

The Tenant does not dispute the Landlord's claims of \$63.00 for the carpet cleaning, \$236.25 for the unit cleaning and \$131.25 for utility costs.

The Landlord states that the tenancy agreement includes a provision for liquidated damages of \$2,250.00 that is payable because the Tenant moved out of the unit without notice to the Landlord and broke the fixed term. The Landlord states that the liquidated damages amount is based on what it actually takes to find a new tenant and represents an amount paid to the agent plus the equivalent of a month's rent. The Landlord states that when a tenant gives two months' notice then there would be no losses as a new tenancy would be found within that time. The Landlord states that if a tenant gives one month notice then the unit could be rented but it more likely takes 5 to 6 weeks to rent. The Landlord states that she does not know how long it would take to re-rent this unit but in general it will take more than one month. The Landlord states that she was not present when the tenancy agreement was signed but that this provision was explained to the Tenant. The Landlord claims \$2,250.00.

The Tenant states that the tenancy agreement was sent to them by email and that they signed and returned it by email. The Tenant states that nobody explained any of the terms to the Tenants. The Tenant states that they did not breach any terms of the tenancy agreement and that they left because the Landlord served the Tenant with a 10 day notice to end tenancy for unpaid rent without collecting the rent that had been paid by internet transfer. The Landlord confirms that the Tenant was given the 10 day notice.

Analysis

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. Section 13 of the tenancy agreement provides that "If Tenant

terminated the Agreement, or causes the Landlord to terminate the Agreement by breaching its terms, before the expiry date, the Tenant agrees to give the Landlord 5 weeks prior written notice and liquidated damages of one and one half months (1 ½) rent (\$2,250.00) to the Landlord for reletting expenses and rental loss.” Noting that this section has been reproduced exactly as it is written in the tenancy agreement, a generous reading of this provision appears to require 5 weeks notice from the Tenant to end the tenancy where the Landlord ends the tenancy due to a breach by the Tenant. In other words, the tenancy agreement appears to require that despite a requirement under the Act to move out of the unit in 10 days after being given a notice to end tenancy for unpaid rent, the Tenant must give 5 weeks’ notice that they are moving out. Despite this section not being at all clear, the 5 week notice requirement conflicts with the Acts provision and is therefore not enforceable. Since this subject matter is joined in the same sentence with the liquidated damages amount I am inclined to find that Section 13 of the tenancy agreement is unenforceable in its entirety however, to be as fair as possible, I will consider the provision for liquidated damages separately.

The Residential Tenancy Branch Policy Guideline #4 provides that a liquidated damages amount 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. Given the undisputed evidence of the Tenant that they received, signed and sent the tenancy agreement by email I find that there was no discussion between the Parties about the liquidated damages clause at the time of signing as claimed by the Landlord. This finding tends to raise questions about the veracity and reliability of the Landlord’s evidence. I also consider that the Landlord’s evidence of a genuine pre-estimate of a loss is unsupported by documentary evidence, is as unclear as the liquidated damages section set out above, and appears to have been determined on the spot. For these reasons I find that the liquidated damages amount is not a genuine pre-estimate but is actually a penalty and therefore not enforceable. I dismiss the claim for liquidated damages.

Given the agreed facts that the Tenant owes \$63.00 for the carpet cleaning, \$236.25 for the unit cleaning and \$131.25 for utility costs I find that the Landlord has substantiated an entitlement to the total amount of **\$430.50**.

As the Landlord has only been successful with the agreed damages, I decline to award the Landlord with recovery of the filing fee. Deducting the Landlord's entitlement from the security deposit of \$750.00 plus zero interest leaves **\$319.50** owed to the Tenant. I order the Landlord to return this amount to the Tenant forthwith.

Conclusion

I Order the Landlord to retain \$430.50 from the security deposit plus interest of \$750.00 in full satisfaction of the claim.

I grant the Tenant an order under Section 67 of the Act for **\$319.50**. If necessary, this order may be filed in the Small Claims 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: November 23, 2015

Residential Tenancy Branch

