



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding HOLLYBURN ESTATES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR MNDC MNSD FF

Introduction

This hearing dealt with an Application for Dispute Resolution filed by the Landlord on July 09, 2015 seeking to obtain a Monetary Order for: unpaid rent or Utilities; to keep all or part of the security and or pet deposit; for money owed or compensation for damage or loss under the Act, regulation, or tenancy agreement; and to recover the cost of the filing fee from the Tenant for this application.

The hearing was conducted via teleconference and was attended by two agents for the Landlord. Therefore, for the remainder of this decision, terms or references to the Landlord importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

No one was in attendance on behalf of the Tenant. The Landlords testified that the Tenant was served their initial application and 50 pages of evidence on July 22, 2015 via registered mail and the package was signed received on August 4, 2015. The amended application was served via registered mail on December 17, 2015 and was signed received on December 21, 2015.

The Landlord affirmed that they served the Tenant with copies of the same documents that they had served the RTB. As such, I accepted the Landlord's relevant submissions as evidence for these proceedings.

Based on the undisputed evidence from the Landlord I find that the Tenant was sufficiently served notice of this hearing in accordance with Section 89(1) of the *Act*. Therefore, I continued in absence of the Tenant.

Issue(s) to be Decided

Has the Landlord proven entitlement to monetary compensation?

Background and Evidence

The Landlord submitted evidence that the Tenant entered into a fixed term tenancy agreement that began on January 1, 2015 and was not set to end until December 31, 2015. Rent of \$1,325.00 was payable on or before the first of each month. On December 30, 2014 the Tenant paid \$662.50 as the security deposit plus a \$50.00 parking gate card deposit. The move in condition inspection report was completed in the presence of both parties on January 1, 2015.

On June 11, 2015 the Tenant served the Landlord notice to end his tenancy effective June 30, 2015, which was prior to the end of the fixed term. A pre-inspection of the rental unit was scheduled to be conducted by the Landlord on June 11, 2015; however, the Tenant did not respond to the request. The Tenant was given two opportunities to attend a move out inspection on June 15, 2015 and June 25, 2015 and the Tenant failed to respond to either request.

On June 30, 2015 the former property administrator attended the office in the rental building and found that the Tenant had placed his rental unit keys through the mail slot and had vacated the building. The final inspection was conducted on July 2, 2015 in absence of the Tenant.

The Landlord submitted that the Tenant left without cleaning the carpets. As such they are seeking \$75.00 for carpet cleaning costs. The carpet cleaning and some other cleaning in the unit had been conducted by the Landlord's staff. The Landlord stated that they had charged the Tenant a reduced rate for their cleaning services. A copy of the standard cleaning charges was provided in evidence and had the Tenant's initials on the bottom right hand corner.

The Landlord submitted a copy of a "Breaking Lease Form" which the Tenant signed on June 11, 2015. That form states, in part, as follows:

In the event that my apartment is rented for the 1st of the month following my move-out, the lease cancellation charges will be \$300.00 in accordance with my Lease Agreement. However, I understand that if the apartment is not rented for the 1st of the month following my move-out, I will be responsible for the payment of the rent payable per my lease until the earlier of:

- (i). the expiration of the lease term as described in section 1.01 of the Lease Agreement, or*
- (ii). the re-renting of the apartment by the Landlord.*

[Reproduced as written]

The tenancy agreement provides at section 2.10 (b) regarding Ending the Tenancy as follows:

If Tenant unilaterally elects to vacate the Premises before the expiration of the term escribed in section 1.01 of this Agreement and Landlord does not elect to treat this Agreement as being at an end, Tenant acknowledges and agrees that s/he shall continue to be responsible for the payment of the rent payable under this Agreement until the earlier of:

- (i) the expiration of the term as described in section 1.01 of this Agreement;*
- (ii) The re-letting of the Premises by Landlord;*

At which time the tenancy shall be at an end. Should the Premises be immediately re-let, so that no rental income is lost, liquidated damages of \$300.00 shall be charged to cover administration costs of re-letting the Premises. Landlord and Tenant acknowledge and agree that the payment of the said damages shall not preclude Landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damages to the Premises and damages as a result of loss of rental income due to Tenant's breach of the terms of this Agreement.

[Reproduced as written]

Upon review of the aforementioned documents the Landlord argued that their interpretation of section 2.10 of the tenancy agreement provided that they could charge the Tenant the \$300.00 liquidated damages clause, regardless of when the rental unit was re-rented because the clause included the section "shall not preclude Landlord from exercising any further right of pursuing another remedy..." They argued that \$300.00 was what they generally considered as being a reasonable cost to re-rent the unit as they advertised the unit and showed the unit many times. No evidence was submitted in support of the actual costs paid for advertising or showing the unit.

The Landlord testified that despite their actions they were not able to re-rent the unit until August 10, 2015. The Landlord stated that they lost rental income for the period of July 1, 2015 to August 9, 2015. The Landlord seeks a loss of rent in the amount of \$1,709.66 which is comprised of \$1,325.00 for the entire month of July plus \$384.66 for the nine days in August calculated at daily rate of \$42.74.

In support of their application the Landlord submitted documentary evidence which included, among other things, copies of: the tenancy agreement; the Tenant's notice to end tenancy; the signed Breaking Lease Form; notices of inspections; move in and move out condition report forms; Cleaning/Replacement Charges document; and the Landlord's Apartment Inspection Summary.

Analysis

After careful consideration of the foregoing, documentary evidence, and on a balance of probabilities I find as follows:

Section 7 of the Act provides as follows in respect to claims for monetary losses and for damages made herein:

- 7(1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.
- 7(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or

their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Section 67 of the Residential Tenancy Act states:

Without limiting the general authority in section 62(3) [*director's authority*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 45 (2) of the Act stipulates that a tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that is not earlier than one month after the date the landlord receives the notice, and is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

In this case the undisputed evidence was the Tenant ended his fixed term tenancy on June 30, 2015 which was six months prior to the end of the fixed term. Accordingly, I find the Tenant breached section 45(2) of the Act. The Landlord took action to mitigate their loss by advertising the unit for re-rent; however, the Landlord was not able to re-rent the unit until August 10, 2015.

Based on the above, I find the Landlord provided sufficient evidence to prove their claim for loss of rent for the period of July 1, 2015 to August 9, 2015. Accordingly, I grant their claim for loss of rent in the amount of **\$1,709.66**.

Section 6(3)(c) of the Act provides that a term of a tenancy agreement is not enforceable if the term is not expressed in a manner that clearly communicates the rights and obligations under it.

Policy Guideline 4 provides, in part, that 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. If the clause is constituted as being a penalty it will be unenforceable. I agree with this interpretation.

With regards to the Landlord's Breaking Lease Form and section 2.10 of the tenancy agreement, I do not accept the Landlord's interpretation that those documents provide the Landlord the right to automatically charge the Tenant a fee of \$300.00 due to his breach if the fixed term tenancy agreement.

Both the Breaking Lease Form and section 2.10 of the tenancy agreement clearly state:

Should the Premises be immediately re-let, so that no rental income is lost, liquidated damages of \$300.00 shall be charged to cover administration costs of re-letting the Premises.

This unit was not immediately re-let; therefore, I find that the liquidated damages clauses listed in the tenancy agreement or the Breaking Lease Form would not apply. Furthermore, I interpret these clauses to be a penalty given the manner in which they are worded. When I consider that the Landlord had a different interpretation these clauses, I conclude that the clause was not written clearly enough and therefore is unenforceable, pursuant to section 6(3) of the *Act* and Policy Guideline 4. Accordingly, I dismiss the Landlord's request for liquidated damages, without leave to reapply.

Although the tenancy agreement does have the clause that states in part "shall not preclude Landlord from exercising any further right of pursuing another remedy..." if the Landlord chose to exercise their right to pursue further losses such as advertising costs, they would be required to submit evidence to prove the amount of those losses.

By their own admission the Landlord did not submit evidence, such as receipts for advertising costs, to support their claim for a loss of \$300.00. Rather, they determined the amount based on what they said their reasonable rate or flat rate was. Therefore, I find there was insufficient evidence to prove a claim of \$300.00 for other losses to re-rent the unit and that claim is dismissed, without leave to reapply.

Section 37(2) of the *Act* provides that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean and undamaged except for reasonable wear and tear.

In regards to the request for carpet cleaning costs, I accept the undisputed evidence that the Tenant failed to have the carpets cleaned at the end of the tenancy, in breach of section 37 of the *Act*. There was evidence that the Tenant initialed agreeing to the Landlord's predetermined cleaning charge document. Therefore, I find there was sufficient evidence to prove the Landlord's claim and I award them costs for carpet cleaning in the amount of **\$75.00**.

The Landlord has primarily succeeded with their application; therefore, I award recovery of the **\$50.00** filing fee, pursuant to section 72(1) of the *Act*.

Monetary Order – This monetary award meets the criteria under section 72(2)(b) of the *Act* to be offset against the Tenant's security deposit plus interest as follows:

Loss of Rent July1 – August 9, 2015	\$1,709.66
Carpet Cleaning	75.00
Filing Fee	<u>50.00</u>
SUBTOTAL	\$1,834.66
LESS: Gate Card Deposit + \$0.00 Interest	- 50.00
LESS: Security Deposit \$662.50 + Interest \$0.00	<u>-662.50</u>
Offset amount due to the Landlord	<u>\$1,122.16</u>

Conclusion

The Landlord has partially succeeded with their application and was awarded monetary compensation of \$1,834.66 which was offset against the Tenant's security and gate card deposits leaving a balance owed to the Landlord of \$1,122.16.

The Landlord has been issued a Monetary Order in the amount of **\$1,122.16**. This Order is legally binding and must be served upon the Tenant. In the event that the Tenant does not comply with this Order it may be filed 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: January 08, 2016

Residential Tenancy Branch

