



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNSD, MNDC, FF

Introduction

This hearing was convened in response to an application by the landlord dated September 04, 2015 for a Monetary Order under the *Residential Tenancy Act* (the Act) in compensation for damage and loss and inclusive of recovery of the filing fee associated with this application; and, an Order to retain the security deposit in partial satisfaction of the monetary claim.

I accept the landlord's evidence that despite the tenant having been served with the application for dispute resolution and notice of hearing by registered mail service in accordance with the definition of *Registered Mail* and Section 89 of the Act the tenant did not participate in the conference call hearing. The landlord provided the tracking number for the registered mail sent to the forwarding address provided by the tenant, and deemed pursuant to Section 90 of the Act as received by the tenant 5 days after it was sent. The mail was returned to the landlord as unclaimed. The landlord testified they also provided all of their evidence to this hearing to the tenant. The landlord was given opportunity to be heard, to present relevant evidence and to make relevant submissions.

Issue(s) to be Decided

Is the landlord entitled to the monetary amounts claimed?

Background and Evidence

The undisputed evidence of the landlord is as follows. This tenancy is subject to a written tenancy agreement provided into evidence. The tenancy began December 01, 2014 as a fixed term tenancy ending November 30, 2015 which ended earlier than contracted on August 31, 2015 when the tenant vacated. Rent in the amount of \$3500.00 was payable in advance on the first day of each month. At the outset of the tenancy, the landlord collected a security deposit from the tenant in the amount of \$1750.00 which the landlord retains in trust. At the outset and the end of the tenancy the landlord and tenant completed a condition inspection and the requisite condition inspection report (CIR) in accordance with the Act. At the end of the tenancy the tenant agreed they were responsible for certain damage and agreed by their signature on the CIR the landlord could retain \$450.00 from the security deposit.

Subsequent to the end to the tenancy the landlord acted to re-rent the unit and was successful in doing so without loss of revenue the month following. The landlord claims *"Liquidated Damages" as initially set out in the addendum of our tenancy agreement.* The landlord relies on the Addendum of the Tenancy Agreement and seeks compensation equivalent of one month's rent: \$3500.00, as penalty, pursuant to the Addendum term 8.

8) **Early Lease Termination Penalty.** In addition to giving the landlord at least one month notice for early termination, the tenant must pay the landlord the equivalent of one month rent as penalty for early termination before the lease end. – as written.

The landlord testified the penalty amount is offset of their costs and efforts to re-rent the unit, and as a strict contractual obligation the tenant should satisfy the terms of the contractual agreement.

Analysis

I accept that a Tenancy Agreement is, effectively, a contract for a tenancy and it is available to the parties to contract or agree as to what will occur in the event that a fixed term agreement is ended early by the tenant. Commonly fixed term tenancy

agreements may include a *liquidated damage* clause intended to offset pre-estimated costs for the landlord to re-rent the unit if the tenancy is ended earlier than contracted. In this matter the landlord's contract term clearly states the tenant must pay a *penalty* of effectively \$3500.00 if the tenant breaks the lease.

Residential Tenancy Policy Guideline #4 (RTPG) respecting *Liquidated Damages* state that in order for a landlord's claim of *Liquidated Damages* to be enforceable, the relevant term of the Tenancy Agreement must reflect a *genuine pre-estimate of loss at the time the contract is entered into*. In addition, for a '*Liquidated Damages*' clause to not be a penalty it must solely represent or state that amount which the parties agreed, at the outset of the tenancy, as a genuine pre-estimate of charges or costs incurred by the landlord to re-rent the unit following a breach of the fixed term Agreement. If the amount for liquidated damages is extravagant in comparison to the greatest loss that would be incurred by the landlord to re-rent the unit, the liquidated damages clause may be interpreted as a penalty or as unconscionable, and therefore unenforceable in legal proceedings. In this matter, I find the landlord's addendum is clear - that the amount claimed is a *penalty* and not at all a *genuine pre-estimate of loss to the landlord at the time the contract was entered*. I find the landlord's term is unfair and unconscionable and therefore the landlord may not rely on the intended operation of the clause. As a result I must **dismiss** the landlord's claim for Liquidated Damages / Early Lease Termination Penalty.

Residential Tenancy Policy Guideline #17, in relevant part, states as follows:

RETURN OR RETENTION OF SECURITY DEPOSIT THROUGH ARBITRATION

The Arbitrator will order the return of a security deposit, or any balance remaining on the deposit, less any deductions permitted under the Act, on:

- a landlord's application to retain all or part of the security deposit, or
- a tenant's application for the return of the deposit

unless the tenant's right to the return of the deposit has been extinguished under the Act. The Arbitrator will order the return of the deposit or balance of the deposit, as applicable, whether or not the tenant has applied for arbitration for its return.

In this application the landlord requested the retention of the security deposit in partial satisfaction of their monetary claim. Because the claim has been dismissed it is appropriate I Order the return of the tenant's security deposit to the tenant, minus the amount to which both parties agreed the landlord was entitled to retain. The parties agreed the landlord would retain \$450.00 from the \$1750.00 held by the landlord in trust. As a result, the tenant is entitled to the balance of their deposit of \$1300.00.

Conclusion

The landlord's application is dismissed, without leave to reapply.

I Order that the landlord may retain \$450.00 of the tenant's security deposit of \$1750.00 and return the balance of \$1300.00 to the tenant forthwith.

I grant the tenant a Monetary Order under Section 67 of the Act for the balance in the amount of **\$1300.00**. If necessary, the Order may be filed in the Small Claims Court and enforced as an Order of that Court.

This Decision is final and binding on both parties.

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: February 10, 2016

Residential Tenancy Branch

