



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

MND, MNSD, MNDC, MNR, OPN, SS, FF

Introduction

This hearing was convened in response to an application by the landlord filed on February 14, 2016 for a Monetary Order for damage to the residential property, and for liquidated damages - to a claims total of \$25,000.00. The landlord also seeks recovery of their filing fee and an Order to retain the tenant's deposits and other funds in partial satisfaction of their claim.

Both parties participated in the conference call hearing. The landlord had benefit of legal counsel. I accept the landlord's evidence they served both tenants with notice of their application by registered mail. The landlord and the tenant in attendance testified both tenants were sent the landlord's evidence package by registered mail to the tenant's forwarding address as provided to the landlord - consisting of document and digital evidence. The tenant in attendance acknowledged the evidence of the landlord. The parties were provided opportunity to resolve or settle their dispute to no avail. Neither party requested a Summons to Testify. The tenant did not request an adjournment. The landlord opposed / declined their legal counsel's recommendation of adjournment.

All parties possessed all available evidence before them and the hearing proceeded on the merits of the claim. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present.

Issue to be Decided

Is the landlord entitled to a Monetary Order as claimed?

Background and Evidence

The evidence is the tenancy started November 30, 2015 as a fixed term tenancy

agreement ending November 30, 2016. The tenancy ended when the tenant vacated January 31, 2016. The agreed monthly rent during the tenancy was \$2220.00 payable in advance. At the outset of the tenancy the landlord collected a security deposit in the amount of \$1110.00 and a pet damage deposit of \$200.00 – both of which the landlord retains in trust. The parties conducted mutual condition inspections of the unit at the start and end of the tenancy and the landlord completed the requisite condition inspection report on January 31, 2016 and submitted into evidence: which same report also included the tenant's forwarding address.

The landlord and the tenants signed a tenancy agreement on November 08, 2015 submitted into evidence which set a fixed term for the tenancy ending on November 30, 2016. The agreement also provided as follows:

Liquidated Damages: *If the tenant ends the fixed term tenancy before the end of the original term as set out in (B) above, the landlord may treat this agreement as being at an end. In such event, the sum of \$2220.00 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty. Liquidated damages covers the landlord's costs of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property – as stipulated.*

After the tenant vacated the landlord received an amount equivalent to the monthly payable rent under the tenancy agreement of \$2220.00 resulting from a preauthorized transfer of the funds. The landlord's submitted they be permitted to retain the \$2220.00 as *liquidated damages*. The tenant has not applied for its return.

The parties agreed that near the end of December 2015 the tenant and landlord exchanged text messages in which the tenant reported to the landlord their dissatisfaction of the tenancy and their determination, "the material provisions of our lease agreement have adversely changed". The tenant's text began advising the landlord they were giving notice for January 2016. The tenant testified they were referring to January 31, 2016. On January 31, 2016 the tenant vacated the rental unit and provided the landlord with a signed document titled *Termination of Tenancy Due to Material Breach of Lease Agreement*.

The landlord testified the rental unit has not been re-rented since the tenant vacated. They provided several text messages of enquiries to re-rent the unit, to no avail. The landlord solely seeks liquidated damages in the amount of \$2220.00.

The landlord further seeks an award in the amount of the balance of their claim limit for damage to the residential property's stamped concrete driveway (the driveway). The landlord claims the tenant effectively fatally damaged the driveway by allowing one of their motor vehicles to leak oil on the driveway during the 2 month tenancy. The

landlord testified the driveway was newly completed approximately 6 months before the start of the tenancy and comprised an area of 2200 square feet. The landlord testified the tenant damaged approximately 1000 square feet of the driveway by way of oil from one of the tenant's vehicles. The landlord testified they used a power washer to clean the affected area. The landlord testified the claimed compromised area is noticeably darker than the rest of the driveway. The tenant does not deny their vehicle leaked some oil onto the driveway, however disputes the extent of the claimed affected area and implicates the landlord son's vehicle also leaked oil during the tenancy period – which the landlord denied. The landlord provided a series of images which they testified they took in the middle of the tenancy period. The images depict the tenant's vehicle and also depictions of a colourful oil film on water (oil on water) during rainfall, and a wet driveway surface. The parties agree the landlord attempted to mitigate ongoing oil contact with the concrete driveway by requiring the tenant utilize a tarp under their vehicle. The tenant testified they think the driveway simply requires degreaser and a power washer to eliminate any oil. Alternatively the landlord seeks the tenants compensate them to the remainder of their claim limit toward the total cost for replacement of the concrete driveway – for which they provided a quoted in the amount of \$48,400.00 – and possibly \$46,200.00.

The landlord presented a witness – DH – whom provided sworn testimony as follows.

Witness DH testified they are a concrete contractor with 30 years' experience, and who authored the driveway replacement quote. They originally installed the current driveway in the summer of 2015. They soon after *sealed* the driveway with what DH referred to as a widely accepted "*solvent-based co-polymer acrylic blend sealer*". They testified the *sealer* is designed to protect the concrete with a hard surface, from various intrusions such as resistance to some chemicals and other contaminants, including resistance to oil. However, the witness stopped short of testifying the sealer shields the concrete from all hazards or completely prevents intrusion from oil. The witness testified the sealer also serves as an optical enhancer to highlight or "bring out" the concrete finish and its design stamping by providing a "wet look" to the finish. The witness testified they again first viewed the concrete since it's installation in the earlier part of March 2016 – approximately 6 weeks after the end of the tenancy – and, again, in the rain and the wet. The witness stated they had no knowledge of how the concrete would depict when dry in the absence of rain. They testified that in their experience, should the oil penetrate the sealer that it is then "almost impossible to remove". However they were not certain the oil penetrated the sealer and they personally have not attempted to clean the concrete driveway. The witness referenced their quote stating they have not seen a product that can successfully remove oil

stains from concrete and because of possible matching issues for old to new concrete they recommend complete removal and replacement of the driveway at their quoted cost of \$46,200.00 to \$48,400.00.

The landlord provided photocopies and digital images of their photos taken at mid tenancy, and a video. Images are of the tenant's vehicle on the driveway and of some oil on water on the driveway. All of the digital images are during or immediately following a rainfall, as all surfaces are wet and water is clearly depicted as pooling on the driveway, on a tarp and near a drain grate. Some images clearly depict the presence of oil on water.

The tenant testified the landlord's photo evidence does not prove the driveway has been compromised and maintained the landlord's claim for replacement of the driveway is exaggerated. The tenant testified they would consider \$100.00 for degreaser and a power washer as appropriate consideration toward the landlord's claim.

The landlord also seeks to recover the \$100.00 filing fee paid to bring their application.

Analysis

I have reviewed all oral and written evidence before me in this matter. However, only the evidence relevant to the issues and findings in this matter are described in this Decision. The landlord has the burden of proving their claims on balance of probabilities.

I find the landlord has applied for *liquidated damages* - and not for remedy in respect to additional losses of revenue. I find the landlord currently holds in trust \$2220.00 the landlord received after the tenant vacated, as well as the tenant's start of tenancy security and pet deposits in the sum of \$1310.00 for a total of \$3530.00 held in trust by the landlord.

Both parties presented evidence of their respective contrasting views of how the tenancy ended. The tenant claimed they were legally entitled to end the tenancy because the landlord breached a material term of the tenancy agreement – pursuant to Section 45(3) of the Act. The landlord's view is the tenant breached the fixed term nature of the agreement.

The following must be noted. **Section 45(3)** of the Act provides as follows:

- 45(3)** If a landlord has failed to comply with a material term of the Tenancy agreement or, in relation to an assisted or supported living tenancy, of the service agreement, and has not corrected the situation

within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

In order for the tenants to have used this section of the Act to end their tenancy, the landlord must have breached a material term of the tenancy and the tenants must have given the landlord written notice of the failure and given reasonable opportunity for the landlord to correct the situation.

The provisions are specific and prescribe the test for eventual reliance on this provision. The tenant must give the landlord *written notice* the landlord has failed to comply with a material term of the tenancy agreement. The notice must clearly identify the breach. The breach must be of a material term. The tenant must provide a reasonable period allowing the landlord to correct the breach: all before the tenant may determine to legally end the fixed term tenancy under this Section. I find the tenant did not meet the test enabling them to then end the tenancy. The tenant's text of late December 2015 is not *written notice*. Even if I were to accept the tenant's text as being the required notice it contains no expectation for corrective action by the landlord of a breach. From the outset of the text it clearly places the landlord on notice the tenants have already determined to vacate. As a result of all the above I find the tenant breached the fixed term nature of the agreement and they cannot rely on the provisions set out in Section 45(3) of the Act to end the tenancy.

It must be known that a tenant who signs a fixed term tenancy agreement is responsible for the rent to the end of the term. A landlord's claim for losses of revenue would be subject to their statutory duty pursuant to **Section 7(2)** of the Act to do whatever is reasonable to minimize the loss. In this matter the landlord solely seeks *liquidated damages* to the exclusion of seeking other future losses.

Claim for Liquidated Damages

It must be noted that a 'Liquidated Damages clause', in order to *not be a penalty*, must solely represent or state an 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, in the event the tenant breached the fixed term nature of the tenancy agreement. In this matter the landlord seeks the stated amount for liquidated damages as full and final resolve to end the tenancy. I find the tenant's sudden departure from the unit did not provide the landlord sufficient time to mitigate their revenue losses for February 2016. I find that the liquidated damages amount claimed, in comparison to the greatest loss that would be incurred by the landlord to re-rent the unit, is not extravagant, and therefore not a penalty. As a result I find the landlord's liquidated

damages clause **is allowed**, *without leave to reapply*. That is, *no other claim for loss resulting from the tenant's breach of the fixed term agreement will be allowed*.

I grant the landlord **\$2220.00** as liquidated damages.

Claim for damage to driveway

In this matter the burden of proving the claim of damage and the associated loss rests on the claimant landlord who must establish, on a balance of probabilities that they have suffered a loss due to the tenant's neglect, or failure to comply with the Act. And, if so established, did the landlord take reasonable steps to mitigate or minimize the loss?

Section 7 of the Act outlines the foregoing as follows:

Liability for not complying with this Act or a tenancy agreement

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.

(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.

Effectively, in this matter the landlord must satisfy each component of the test below:

1. Proof the loss exists,
2. Proof the damage or the loss occurred solely because of the actions or neglect of the tenant in violation of the *Act* or agreement
3. Verification of the actual amount required to compensate for the claimed loss or to rectify the damage.
4. Proof that the landlord followed section 7(2) of the *Act* by taking reasonable steps to minimize the loss or damage.

The landlord bears the burden of establishing their claim by proving the existence of the loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the tenant. Once established, the landlord must then provide

evidence that can verify the actual monetary amount of the loss. Finally, the landlord must show that reasonable steps were taken to address the situation and to mitigate the loss incurred or claimed.

On the matter of the concrete driveway I have reviewed the landlord's oral evidence, digital image evidence, and the evidence presented by their witness - all in support of their claim oil from the tenant's vehicle fatally compromised the stamped concrete driveway surface so as the driveway requires replacement.

I have also carefully reflected on the evidence of the landlord's witness – whose 30 years experience with concrete driveways I accept. The witness described they used a product which *sealed* the driveway surface when it was new so as to provide a measure of *protection from contaminants* as well as to give the concrete surface an enhancing *wet look* appearance - even when dry. I also accept the witness only viewed the concrete when wet in the rain and they had no knowledge how the concrete's appearance, as claimed by the landlord, depicted when dry. Lastly, they stated that in their experience they were *not certain* that oil had penetrated the sealed surface.

I also carefully reflected on the landlord's own evidence depicting an oil film on water – and mindful the depicted water is on a surface previously sealed and designed to appear wet when dry. In addition I accept they used a power washer to clean the driveway, however the landlord's evidence does not include the results after cleaning, or any depiction of how the driveway appears dry. From the evidence I am unable to confirm the landlord's claim an area of the driveway depicts noticeably darker than another.

On preponderance of the overall evidence, I find a lack of sufficient evidence the driveway has been compromised. Plainly, I find the landlord has not shown, on a balance of probabilities that a loss exists in respect to the driveway. I find the landlord has not met the key portion of the test for damage and loss prescribed by Section 7 of the Act, and as a result **I dismiss** the landlord's claim for damage to the driveway.

Having partially granted the landlord's application they are entitled to recover their filing fee of \$100.00.

The tenant's deposits and other monies in trust will be off-set from the award made herein.

Calculation for Monetary Order

Liquidated damages to landlord	\$2220.00
Filing fee for the cost of this application to landlord	\$100.00
<i>Less tenant's deposits and other monies held in trust:</i>	
<i>total</i>	-\$3530.00
Monetary Order to tenant	(\$1210.00)

Conclusion

The landlord's application in relevant part has been granted.

I Order that the landlord may retain \$2320.00 of the tenant's total monies held in trust, inclusive of the tenant's start of tenancy deposits, in full satisfaction of their claim and I grant the tenant an Order under Section 67 of the Act for the balance of **\$1210.00**. If necessary, this 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: April 08, 2016

Residential Tenancy Branch