



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding MURRAY HILL DEVELOPMENTS LTD.  
and [tenant name suppressed to protect privacy]

## **INTERIM DECISION**

Dispute Codes      MNSD, MNDC, FF

### Introduction and Preliminary Matter

This hearing convened as a result of a Landlord's Application for Dispute Resolution, filed November 6, 2015, wherein the Landlord sought a Monetary Order for unpaid rent, for money owed or compensation for damage or loss under the *Residential Tenancy Act*, the Regulation, or the tenancy agreement, authority to retain the security deposit and recovery of the filing fee.

The hearing occurred on May 26, 2016, June 27, 2016 and June 28, 2016. The Tenant failed to call in on any of the dates set for the hearing of this matter.

The Landlord's representative, S.J., called into the hearing on all three dates. At the May 26, 2016 hearing, he testified that the Tenant was served with Notice of the Hearing as well as the Landlord's Application for Dispute Resolution by registered mail to the address provided by the Tenant in a letter dated September 11, 2015. This letter was provided in evidence in addition to a document from Canada Post confirming the registered mail was signed for by the Tenant. Pursuant to section 90 of the *Residential Tenancy Act* I find the Tenant was duly served with the Notice of Hearing and I proceeded in her absence.

### Issues to be Decided

1. Is the Landlord entitled to monetary compensation from the Tenant?
2. Should the Landlord be authorized to retain the Tenant's security deposit?
3. Should the Landlord recover the filing fee?

### Background and Evidence

Introduced in evidence was a copy of the residential tenancy agreement providing that the tenancy began on September 1, 2015 for a fixed term to February 29, 2016. Monthly rent was payable in the amount of \$750.00. The Tenant paid a security deposit in the amount of \$375.00.

The Landlord testified that the Tenant gave written notice to end the tenancy on September 11, 2015. Introduced in evidence was a copy of a letter from her confirming that she wished to terminate her lease. The Tenant writes in her letter "I understand there will be a fee for the termination."

In her letter dated September 11, 2015 she also provided her forwarding address in writing. As noted, this is the address to which the Landlord sent the Application for Dispute Resolution and Notice of Hearing.

The Landlord testified that the Tenant moved from the rental unit on October 22, 2015. A copy of the move out condition inspection dated October 22, 2015 was introduced in evidence.

The Landlord testified that the Tenant's rent cheque for October 2015 was returned for non-sufficient funds. A copy of the notification from the Landlord's bank was provided in evidence and confirms the Landlord was charged \$25.00 for this.

The Landlord stated that he called the Tenant on October 5, 2015 and October 6, 2015 offering her the opportunity to complete the move out condition inspection. He stated that on October 5, 2015 the Tenant did not attend. He further testified that she stated that she was too busy on October 6, 2015 to participate in the inspection.

The Landlord confirmed he was able to re-rent the rental unit for November 1, 2015 such that he sought the sum of \$750.00 for loss of rent for October 2015.

The Landlord also requested the sum of \$200.00 in liquidated damages; liquidated damages were specifically provided for in paragraph 21 of the tenancy agreement which reads as follows:

*Tenants breaking this Lease Agreement remain responsible for the payment of rent and utilities for the duration of the lease. Additionally, the Tenant will be assessed the sum of Two Hundred (\$200.00) dollars as liquated damages and not as a penalty, to cover the Landlord's administration costs of re-renting the said premises. A duly signed, written vacate notice from the tenant is required before efforts to rent the unit can commence. There is a reasonable possibility*

*that the unit will not be successfully rented before the end a lease term and the tenant fully accepts this risk”*

[Reproduced as Written]

The Landlord also sought recover of the N.S.F. fee in the amount of \$25.00. He confirmed he was charged \$25.00 as a result of the Tenant's October 2015 cheque being returned for non-sufficient funds.

Finally the Landlord sought recovery of the \$50.00 filing fee.

### Analysis

Based on the above, the undisputed testimony and evidence before me, and on a balance of probabilities, I find as follows.

The Landlord is entitled to compensation for loss of rent for the month of October 2015 in the amount of **\$750.00**. Pursuant to section 45 of the *Residential Tenancy Act*, the effective date of the Tenant's written notice, provided on September 11, 2015, is October 31, 2015. For greater clarity, I reproduce section 45 as follows:

#### **Tenant's notice**

- 45** (1) A tenant may end a periodic tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a) is not earlier than one month after the date the landlord receives the notice, and
  - (b) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
- (2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that
- (a) is not earlier than one month after the date the landlord receives the notice,
  - (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
  - (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.
- (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.

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

The Landlords seeks payment of the \$200.00 in liquidated damages provided for in the residential tenancy agreement.

*Residential Tenancy Policy Guideline 4—Liquidated Damages* provides in part as follows:

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. The amount agreed to 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. 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.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- A sum is a penalty if it is extravagant in comparison to the greatest loss that could follow a breach.
- If an agreement is to pay money and a failure to pay requires that a greater amount be paid, the greater amount is a penalty.
- If a single lump sum is to be paid on occurrence of several events, some trivial some serious, there is a presumption that the sum is a penalty.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

In the case before me, it is clear the Tenant signed the tenancy agreement which specifically provided for liquidated damages. She makes reference to this in her

September 11, 2015 letter when she acknowledges there will be a “fee for the termination”. It is also clear that the Tenant breached the fixed term tenancy.

Based on the foregoing, I find the liquidated damages clause to be enforceable and I award the Landlord the **\$200.00** claimed.

I also accept the Landlord's evidence that he was charged an N.S.F. fee by his bank. As this was as a result of the Tenant's October 2015 rent cheque being returned for non-sufficient funds, I award him **\$25.00** as claimed.

As the Landlord has been successful I also award him the **\$50.00** fee he paid to file his application for dispute resolution.

In total, I award the Landlord compensation in the amount of **\$1,025.00**.

I Order that the Landlord retain the security deposit of **\$375.00** in partial satisfaction of the claim and I grant the Landlord a Monetary Order under section 67 for the balance due of **\$650.00**. This Monetary Order may be filed in the Provincial Court (Small Claims) and enforced as an Order of that Court.

### Conclusion

The Landlord may retain the Tenant's security deposit and is granted a Monetary Order in the amount of **\$650.00**.

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: June 29, 2016

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Residential Tenancy Branch