



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NPR GP INC (General Partner for NPR Limited Partnership)
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNR MNSD MNDC FF

Introduction

This hearing was scheduled to hear matters pertaining to the Landlord's application for Dispute Resolution filed on February 16, 2016. The Landlord filed seeking a Monetary Order for: unpaid rent and/or utilities; to keep the security 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.

The hearing was conducted via teleconference and was attended by the Landlord and the Tenants' Agent. The Tenants' Agent affirmed he was representing both respondent Tenants. As there were two Tenants listed as respondents and submissions were made by one agent, terms or references to the Tenants importing the singular shall include the plural and vice versa, except where the context indicates otherwise.

The Agent confirmed the Tenants received copies of the Landlord's application, notice of hearing documents, and evidence. No issues regarding receipt or service of those documents were raised. As such, I considered the Landlord's submissions as evidence for these proceedings.

No documentary evidence had been received on file from the respondent Tenants. The Agent testified he was not aware of any documentary evidence submitted by the Tenants in response to the Landlord's application for Dispute Resolution. Rather, he said the Tenants' documentary evidence was submitted in support of their own application which was scheduled to be heard in 2017.

Issue(s) to be Decided

1. Has the Landlord proven entitlement to monetary compensation for unpaid rent?
2. Is the Landlord entitled to liquidated damages?
3. Is the Landlord entitled to reimbursement of a lease incentive agreement?

Background and Evidence

The Tenants began occupying the rental unit on September 1, 2013 based on a written fixed term tenancy agreement. The Tenants entered into subsequent fixed term tenancy agreements with the last agreement beginning on July 1, 2015 and was not scheduled to end until June 30, 2016. As per the written tenancy agreement rent of \$922.50 was payable on or before the first of each month. The security deposit of \$450.00 was paid on July 26, 2013 and was transferred to each subsequent tenancy agreement.

The parties attended and signed the move in condition inspection report on September 1, 2013. The move out condition inspection report was completed and signed by both parties on January 31, 2016. The Tenants' forwarding address was provided to the Landlord during the move out inspection on January 31, 2016.

On December 29, 2015 the Tenants served the Landlord with notice to end their fixed term tenancy early, effective January 31, 2016.

The Tenants' January 1, 2016 rent payment was returned NSF. As such the Landlord seeks \$812.51 for the unpaid January rent. In addition, the Landlord sought \$1,097.45 for the value of the lease incentive plus \$461.25 for liquidated damages. The Landlord noted that the amount claimed for liquidated damages was less than the amount agreed upon in section 5 of the tenancy agreement. The Landlord stated they were seeking a lower amount for liquidated damages because they were able to re-rent the unit effective February 1, 2016.

The Landlord testified that the Tenants were paying rent of \$812.51 per month because section 44 of the tenancy agreement provided for a rent reduction as an incentive for signing the fixed term lease. She argued that section 5 of the tenancy agreement provided the liquidated damages clause.

Section 44 of the tenancy agreement submitted into evidence was initialed by the Landlord and both Tenants and stated as follows

44. OTHER.

An Incentive is applicable to the initial term of the lease only. The amount of \$100.00 will be applied toward rent for the months of July 2015 to June 2016. The lease entered by the above tenant(s) and [Landlord's name] must be fulfilled in its entirety or the Incentive will be considered void. Should the agreement NOT BE FULFILLED the tenant(s) will be liable for repayment of said Incentive.

[Reproduced as written excluding Landlord's name]

A copy of the tenant payment ledger was submitted into evidence which indicated rent had been charged at \$922.50. That ledger also listed, in part, a credit or rent reduction as follows:

Lease Incentives Free Rent (01/2016) (109.99)

[Reproduced as written]

Section 5 of the tenancy agreement stated as follows:

5.LIQUIDATED DAMAGES. If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any fixed term, or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of \$922 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.

[Reproduced as written]

The Agent argued the Tenants' rent was \$812.50 and not \$922.50 as submitted by the Landlord. The Agent asserted that there was never any NSF cheque written as the rent payments were paid by automatic withdrawal. He later confirmed that the \$812.50 for January 2016 rent had not been paid and the Tenants accepted responsibility to pay that amount.

The Agent disputed the Landlord's claim for reimbursement of the lease incentive amount and argued there was never a lease incentive as rent had always been \$812.50.

The Agent argued the Landlord was not entitled to liquidated damages as he was of the opinion that the Tenants' lease was never broken. He submitted that when the Landlord emailed the Tenants to schedule the move out inspection for January 31, 2016 the Tenants responded via email refusing the request and asked the Landlord at that time if they could sublease their rental unit. The Agent submitted that it was during that email conversation that the Landlord told the Tenants the Landlord had found a new tenant effective February 1, 2016. He asserted that because the Landlord found someone to rent the unit the lease was not broken and the Landlord did not suffer damages. The Agent was not able to provide the date of that email exchange.

In closing, the Landlord submitted that all the items disputed by the Agent were provided for in the clauses of the tenancy agreement which were agreed upon by the Tenants when they signed the agreement.

Analysis

Section 62 (2) of the *Act* stipulates that the director may make any finding of fact or law that is necessary or incidental to making a decision or an order under this *Act*.

After careful consideration of the foregoing; documentary evidence; and on a balance of probabilities I find pursuant to section 62(2) of the *Act* 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 that 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

Under section 26 of the Act, a tenant is required to pay rent in full in accordance with the terms of the tenancy agreement, whether or not the landlord complies with this Act. A tenant is not permitted to withhold rent without the legal right to do so. A legal right may include the landlord's consent for deduction; authorization from an Arbitrator or expenditures incurred to make an "emergency repair", as defined by the Act.

I accept the Landlord's undisputed evidence that the Tenants failed to pay their \$812.51 rent that was due January 1, 2016 as required by section 26 of the *Act*. The Agent confirmed the Tenants took responsibility to pay their January 2016 outstanding rent. Accordingly, I grant the Landlord's claim for unpaid rent in the amount of **\$812.51**, pursuant to section 67 of the *Act*.

Regarding the Landlord's claim for liquidated damages, common law provides that I must consider which party breached their obligation to the tenancy agreement first when determining if the other party is entitled to losses resulting from that specific breach.

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.

The Residential Tenancy Policy Guideline 11 provides that a landlord or tenant cannot unilaterally withdraw a Notice to End Tenancy. I concur with this policy and find that it is applicable to these matters.

In this case the Tenants breached section 45(2) of the *Act* and section 4 of their tenancy agreement when they issued the Landlord written notice to end their tenancy effective January 31, 2016; which was five months prior to the end of their fixed term. I find the Landlords did what was reasonable to mitigate their losses, as required by section 7 of the *Act*, by re-renting the unit as soon as possible.

I do not accept the Agent's submissions that the Tenants' lease was never broken. Rather, by his own submissions the Agent confirmed that the Tenants did not request permission to sublease the rental unit until after the Tenants had served the Landlord with their notice to end their fixed term tenancy early, in breach of the *Act* and tenancy agreement. Furthermore, the Agent confirmed that the Landlord had responded to the Tenants' request advising they had already found new tenants to re-rent the unit.

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. In this case the Landlord claimed an amount that was less than the pre-estimate amount as they were able to re-rent the unit quickly.

Based on the totality of the evidence before me, I conclude the Landlord submitted sufficient evidence to prove their claim for liquidated damages. Accordingly, I grant the application for the amount claimed of **\$461.25**, pursuant to section 67 of the *Act*.

The *Residential Tenancy Act* does not define or provided for a lease incentive. Without a formal test for defining a lease incentive in relation to a tenancy agreement, I proceeded to consider the interpretation under a reasonable person standard and determined the following:

A lease incentive is a financial award, often issued in a lump sum payment or as a monthly amount, offered by a landlord to a prospective tenant and commonly known as a signing bonus. The bonus is a predetermined amount used as an incentive to encourage a tenant to sign a lease and is often received or seen as a deduction from the monthly rent payment.

Such lease incentives are not provided for under the *Residential Tenancy Act* (the *Act*). Notwithstanding the Landlord's arguments they are entitled to recover the lease incentive because it is provided for in the tenancy agreement; section 6(3) of the *Act* provides that a term of a tenancy agreement is not enforceable if the term is inconsistent with this *Act* or the regulations; the term is unconscionable; or the term is not expressed in a manner that clearly communicates the rights and obligations under it.

When a landlord tries to recover such lease incentives that recovery may be viewed as a rent increase in breach of the Act. Section 42(1) of the Act stipulates that rent cannot be increased for at least 12 months after the rent was first established under the tenancy agreement.

After consideration of the foregoing; the tenancy agreement that listed rent as being \$922.50; the lease incentive being \$100.00 ($\$922.50 - \$100.00 = \822.50); and the tenant ledger and undisputed submissions that the Tenants had been paying only \$812.51 as their monthly rent; I conclude the lease incentive listed in section 44 of the tenancy agreement is unenforceable as it reflects an invalid rent increase. Furthermore, the evidence of the amount of rent being paid is inconsistent with the lease incentive term which makes the amount of rent payable unclear. Accordingly, I dismiss the Landlord's claim of \$1,097.45 for repayment of the lease incentive, without leave to reapply.

Section 72(1) of the Act stipulates that the director may order payment or repayment of a fee under section 59 (2) (c) [*starting proceedings*] or 79 (3) (b) [*application for review of director's decision*] by one party to a dispute resolution proceeding to another party or to the director.

The Landlord has partially succeeded with their application; therefore, I award recovery of the **\$100.00** filing fee, pursuant to section 72(1) of the Act.

The Residential Tenancy Branch interest calculator provides that no interest has accrued on the \$450.00 security deposit since July 26, 2013.

I find this monetary award meets the criteria under section 72(2)(b) of the Act to be offset against the Tenants' security deposit plus interest as follows:

Unpaid January 2016 Rent	\$ 812.51
Liquidated Damages	461.25
Filing Fee	<u>100.00</u>
SUBTOTAL	\$1,373.76
LESS: Security Deposit \$450.00 + Interest \$0.00	<u>-450.00</u>
Offset amount due to the Landlord	<u>\$ 923.76</u>

The Tenants are hereby ordered to pay the Landlord the offset amount of \$923.76, forthwith.

In the event the Tenants do not comply with the above order, The Landlord has been issued a Monetary Order in the amount of **\$923.76** which may be enforced through Small Claims Court upon service to the Tenants.

Conclusion

The Landlord was partially successful with their application for Dispute Resolution and was awarded monetary compensation of \$1,373.76. That award was offset against the Tenants' security deposit leaving a balance owed to the Landlord in the amount of \$923.76.

This decision is final, legally binding, and 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 01, 2016

Residential Tenancy Branch

