



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes OPB, OPN, MNR, MNDC, MNSD, FF

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the "Act") for:

- an order of possession for breach of a fixed term tenancy agreement pursuant to section 55;
- an order of possession based on the tenants' written notice to end the tenancy pursuant to section 55;
- a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("Regulation") or tenancy agreement pursuant to section 67;
- authorization to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenants pursuant to section 72.

Tenant AS, the tenants' advocate (collectively the "tenant") and the landlord attended the hearing. The parties were each given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses.

At the outset of the hearing, each party confirmed that they had received the other party's evidence. I find that both parties were duly served with these documents in accordance with sections 88 and 89 of the *Act*. Both parties were given full opportunity to give affirmed testimony and present their evidence.

At the outset of the hearing the parties testified that the tenants vacated the rental unit in August of 2016. Consequently, the landlord is not seeking an order of possession and these portions of the landlord's application are dismissed without leave to reapply.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent and for money owed or compensation for damage or loss under the *Act* *Regulation* or tenancy agreement?

Is the landlord authorized to retain all or a portion of the tenants' security deposit in partial satisfaction of the monetary order requested?

Is the landlord authorized to recover the filing fee for this application from the tenants?

Background and Evidence

As per the submitted tenancy agreement and testimony of the parties, the tenancy began on April 1, 2016 on a fixed term until March 31, 2017. Rent in the amount of \$1,325.00 was payable on the first of each month. The tenants remitted \$675.00 for the security deposit at the start of the tenancy.

In an August 10, 2016 letter, the tenants advised the landlord that due to employment, the tenants were vacating the rental unit September 10, 2016, before the March 31, 2017 expiry of the fixed term tenancy. The tenants vacated the rental unit, returned the keys and provided their forwarding address August 29, 2016. The rental unit was re-rented effective September 15, 2016.

Landlord Claims and Tenants Reply

The landlord is seeking compensation in the amount of \$2,750.00, including the following;

Item	Amount
Liquidated damages	\$1,325.00
Liquidated damage Interest	\$1,325.00
Unpaid Utilities and Cleaning	\$50.00
Unpaid Utilities and Cleaning Interest	\$50.00
Total Monetary Claim	\$2,750.00

Liquidated Damages and Interest.

The landlord testified that at the time the parties entered into the tenancy agreement, the tenants were advised of the liquidated damages clause. The landlord understood the tenants first language was not English and therefore translated the English tenancy agreement in its entirety to the tenants. The landlord contends in signing the tenancy agreement, the tenants agreed their termination of the fixed term tenancy prior to expiry, would result in \$1,325.00 in liquidated damages for the landlords cost of re-renting. The landlord testified that although a new tenancy was secured effective September 15, 2016, the landlord incurred costs in re-renting and has elected to invoke the liquidated

damage clause. The landlord also seeks \$1,325.00 in interest for the tenant's failure to pay the liquidated damages at the end of the tenancy.

In reply, the tenants contend that because English is not their first language and the tenancy agreement was drafted in English they relied on the landlord to translate the tenancy agreement. It is the tenants' position that the landlord did not translate or explain the liquidated damage clause; therefore the tenants were unaware of the clause when signing. The tenants allege the term is therefore unconscionable because the landlord failed to inform the tenants of the clause and took advantage of the tenants' ignorance of the English language.

Further, the tenants argue the landlord ended the lease. The tenants were granted permission to assign the lease, found suitable tenants and the landlord withdrew his permission because those tenants did not want to pay higher rent.

It is the tenants' position that even if it were determined the tenants ended the lease; the landlord has provided no evidence that the damage clause is a genuine pre-estimate of loss.

Unpaid Utilities, Cleaning and Interest.

It is the landlord's position that the tenancy agreement obligates the tenants to pay 1/3 of the utility charges and the tenants have failed to pay the outstanding August 2016 utility charges. Although the landlord's monetary worksheet indicates he is seeking \$50.00 for utilities and cleaning as well as \$50.00 for interest, during the hearing the landlord testified that he was no longer seeking compensation for cleaning and only sought \$17.00 for utilities. The landlord has submitted a copy of one utility bill dated September 6, 2016, reflecting a \$9.67 credit.

In response, the tenants testified that on or around August 25, 2016 the landlord requested \$50.00 to cover the cost of utilities until the end of tenancy to which the tenants agreed and forwarded a cheque in the amount of \$50.00.

The landlord denied that he requested a \$50.00 payment of utilities in August. Instead the landlord testified that on an undisclosed date he sent copies of the utility bills with notice to pay. On March 4, 2017, the landlord received a \$50.00 cheque dated February 27, 2017 from the tenants. The landlord has not cashed this cheque to date.

Security Deposit.

The landlord seeks to offset his monetary claim with retention of the security deposit.

The tenants seek double the security deposit as it is their position that the landlord did not file his application with 15 days of receipt of their forwarding address.

Analysis

Based on the testimony of the parties and submitted tenancy agreement, the parties had a fixed term tenancy that was scheduled to end on March 31, 2017. Although the tenants contend they did not end the tenancy, I find their letter dated August 10, 2016 serves as formal notice to end the tenancy by September 10, 2016. This notice ended the tenancy earlier than the date specified in the fixed term tenancy agreement, which is not in compliance with section 45 of the *Act*.

Pursuant to the Residential Tenancy Policy Guideline #30 neither a landlord nor a tenant can end a fixed term tenancy unless for cause or by written agreement of both parties. Because relocation due to employment does not constitute cause and the parties did not sign a mutual agreement to end tenancy, I find the tenants ended the tenancy contrary to the *Act*.

Liquidated Damages and Interest

The tenants ended the tenancy contrary to the *Act*, and the parties signed an agreement that included a liquidated damage clause, therefore the tenants may be held liable for the amount stipulated in that clause, even if the landlord did not incur this amount of actual loss or damages.

As the tenants allege the term is unconscionable, on the basis that the landlord exploited them through their ignorance of the English language, the tenants bear the burden to prove this took place. I find the tenants have provided insufficient evidence to establish the landlord did not adequately translate or explain the liquidated damage clause. Therefore I do not find the term unconscionable.

The amount of the liquidated damage clause stipulated and agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into, otherwise the clause may constitute a penalty and not be enforceable. The following are the tests used to determine whether a clause constitutes a penalty;

- *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.*

Upon review of the clause, I am satisfied that the liquidated damage clause which indicates a pre-estimate of \$1,800.00, does not constitute a penalty. This amount is not extravagant in comparison to the potential greatest loss, the clause does not require a greater amount be paid for failure to pay or require a single lump payment on occurrence of several events. For these reasons, I award the landlord \$1,325.00 in liquidated damages.

In relation to the landlord's claim for \$1,325.00 in interest, I find the landlord has failed to establish he suffered a loss equivalent to \$1,325.00 as a result of the tenants' failure to pay liquidated damages. This portion of the landlord's claim is dismissed.

Unpaid Utilities, Cleaning and Interest.

Although the tenancy agreement obligates the tenants to pay 1/3 of the utilities and the tenants are agreeable to paying utilities, I find the landlord has provided insufficient evidence to substantiate what if any amount remains outstanding. For this reason I dismiss the landlord's claim for outstanding utilities and interest in the total amount of \$100.00.

Filing Fee

As the landlord was partially successful in this application, I find that the landlord is entitled to recover the \$50.00 filing fee paid for the application for a total award of \$1,375.00.

Security Deposit

Based on the evidence presented, the landlord received the tenants' forwarding address on August 29, 2016 and filed an application to retain the deposit on September 12, 2016. Therefore I find that the landlord complied with the requirement under section 38 to make an application to keep the deposit with 15 days of receipt of the forwarding address. The tenants are therefore not entitled to double recovery of the deposit.

As the landlord has established a damage claim in the amount of \$1,375.00, in accordance with the offsetting provisions of section 72 of the Act, I allow the landlord to retain \$675.00 of the security deposit in partial satisfaction of the monetary award and I grant an order for the balance due \$700.00.

Conclusion

Item	Amount
Liquidated damages	\$1,325.00
Filing Fee	\$50
Less Security Deposit	(\$675.00)
Total Monetary Order	\$700.00

The landlord is entitled to \$1,375.00. I order the landlord to retain the \$675.00 security deposit in partial satisfaction of the monetary award and I grant an order for the balance due \$700.00.

The remainder of the landlord's application for a monetary order is dismissed without leave to reapply.

I dismiss the landlord's application for an order of possession for breach of a fixed term tenancy agreement.

I dismiss the landlord application for an order of possession based on the tenants' written notice to end the tenancy.

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: March 27, 2017

Residential Tenancy Branch