



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding MAINSTREET EQUITY CORP.
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes

CNR MNR MNDC MNSD FF

Introduction

This hearing dealt with applications from both the landlord and the tenant under the *Residential Tenancy Act* ("the *Act*"). The landlord applied for a monetary order pursuant to section 67; authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38; and authorization to recover the filing fee from the tenant pursuant to section 72.

This tenant applied pursuant to the *Residential Tenancy Act* ("the *Act*") to cancel the landlord's 10 Day Notice to End Tenancy for Unpaid Rent ("10 Day Notice") pursuant to section 46 and to recover the filing fee for this application from the landlord pursuant to section 72. At this hearing, the tenant withdrew her application to cancel the 10 Day Notice, testifying that she had vacated the rental unit.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. The landlord confirmed receipt of the tenant's Application for Dispute Resolution ("ADR"). The tenant confirmed receipt of the landlord's ADR.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for unpaid rent, an insufficient funds charge and a "lease breaking fee"?

Is the landlord entitled to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order?

Is either the landlord or the tenant entitled to recover the filing fee for this application the other party?

Background and Evidence

This tenancy began as a 6 month fixed term on January 14, 2017 with a monthly rental amount of \$850.00 payable on the first of each month. The tenant testified that she vacated the rental

unit on March 15, 2017 subject to a 10 Day Notice to End Tenancy issued by the landlord. The landlord testified that he continues to hold a \$425.00 security deposit paid by the tenant at the outset of this tenancy.

At this hearing, the landlord sought to retain the tenant's security deposit towards a monetary order for unpaid rent and a "lease breaking fee". The landlord submitted a copy of the residential tenancy agreement for this hearing. The first page of the agreement, directly below the rental period and terms of tenancy, the agreement read,

...If the Tenant terminates the tenancy in less than 6 months, \$350 + RENT CONCESSIONS (if any) will be charged by the Landlord and the Tenant will pay this amount as a service charge for tenancy change over costs, such as advertising, interviewing, administration, re-renting, for this short-term tenancy. This is not a penalty.

Both parties agreed that the tenant did not pay a rental amount for March 2017. The tenant testified that she had told the landlord to retain her security deposit to pay for half of March rent prior to her vacating the rental unit. She submitted that she vacated the rental unit based on the landlord's 10 Day Notice and therefore, she should not be charged for breaking the lease.

Both parties agreed that the landlord showed the apartment on March 3, 2017 and March 7, 2017. The landlord submitted that each time he showed the rental unit, he spent approximately a half hour doing so. He testified that he also showed the rental unit on March 10, 2017 and, that it was after that date, that the landlord accepted an application to rent the unit.

Both parties agreed that the tenant vacated the residence on March 15, 2017. The landlord testified that he re-rented the rental unit for March 16, 2017. The landlord sought a total of \$786.29 at this hearing (reduced from the original amount of \$1225.00). The landlord testified that the tenant owed \$425.00 in rent for the first half of March 2017; that the tenant was required to pay a \$350.00 lease break fee; and that she should be made to pay a \$25.00 insufficient funds charge that the landlord incurred as a result of her failure to pay March 2017 rent in accordance with the agreement.

The tenant confirmed that she withheld March 2017 rent in an effort to get the landlord to take action on a mold issue and other repair issues in the rental unit. The tenant says that she intended to pay her rent after her requests for repairs were addressed.

Analysis

Section 26(1) of the *Act* establishes that "a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the

rent.” A right to deduct all or a portion of the rent must be allowed by an Arbitrator. As the tenant testified that she did not pay rent (as she was attempting to get the landlord to act on the mold issue), the landlord was justified in filing a 10 Day Notice for Unpaid Rent. The landlord testified that the outstanding rental amount is \$411.59. **I find that the landlord is entitled to \$411.59 in unpaid rent for the first half of March 2017.**

The landlord sought a \$350.00 lease breaking fee. Policy Guideline No. 4 provides guidance with respect to monetary claims by the landlord for “lease breaking”,

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.

Guideline No. 4 provides a variety of considerations in determining if a liquidated damages clause is a penalty. In this case, I find that it is not a penalty as the residential tenancy agreement provides for a \$350.00 fee amount which is less than the amount in rent the tenant was obliged to pay monthly and less than the half months’ rent that the landlord sought to recover. The landlord provided evidence to support his change-over costs at the end of this tenancy including advertising to re-rent and showing the unit to prospective renters.

As paying rent is a primary part of a residential tenancy agreement and the tenant chose not to pay rent, she effectively chose to end the tenancy. The tenant failed to pay rent and chose to vacate the rental premises after being provided a 10 Day Notice to End Tenancy for Unpaid Rent. A fixed term tenancy creates security for both parties to the agreement. Based on all of the evidence submitted at this hearing, the tenant breached the primary conditions of the residential tenancy agreement (both to pay rent and to continue tenancy for 6 months) and should therefore be required to pay the lease break fee. **I find that the landlord is entitled to the \$350.00 lease break fee.**

I accept the testimony of the landlord, supported by his documentary evidence that the tenant did not pay rent in March 2017. With respect to the landlord’s claim to recover the insufficient funds fee for the tenant’s non-payment, I find that the landlord is entitled to compensation for this fee as a result of the failure to pay rent. **I find the landlord is entitled to \$25.00 for an insufficient funds charge to his account.**

Pursuant to section 72(2), **I allow the landlord to retain the tenant’s security deposit towards his total monetary award.**

I find that the landlord is entitled to recover his \$100.00 filing fee for this application from the tenant. I dismiss the tenant's application to recover her filing fee in all of the circumstances.

The landlord is entitled to a monetary award as follows,

Item	Amount
Unpaid Rent March 2017	\$425.00
Lease Break Fee	350.00
Insufficient Funds Fee	25.00
Less Security Deposit	-425.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order	\$475.00

Conclusion

I grant the landlord a monetary order in the amount of \$475.00.

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial Court and enforced as an Order of that Court.

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 28, 2017

Residential Tenancy Branch