



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MND, MNR, MNSD, FF

### Introduction

This hearing dealt with the landlord's application for a Monetary Order for loss of rent and liquidated damages; and, authorization to retain the tenants' security deposit. The tenants did not appear at the hearing. The landlord testified that she sent hearing packages to each tenant via registered mail on February 12, 2017. The landlord provided registered mail tracking information from the Canada Post website, including tracking numbers, as proof of service.

The address used to serve the female tenant was the address that appeared on the tenant's cheques and appearing as the return address on the envelope the tenant had used to send the tenant's notice to end tenancy. The registered mail sent to the female tenant was successfully delivered on February 16, 2017. I was satisfied the female tenant was duly served with notification of this proceeding.

The registered mail sent to the male tenant was sent to the address that he had provided to the landlord in emails exchanged between the parties on February 10, 2017. The registered mail package sent to the male tenant was unclaimed. I requested the landlord provide me with copies of the email exchanges from February 10, 2017, which she did. Upon receipt of the emails I was satisfied the landlord sent the hearing package to the male tenant at the forwarding address he had provided to her. Section 89(1) of the Act provides that a landlord may serve a tenant at the forwarding address provided by the tenant. Section 90 of the Act deems a person to have received mail five days after mailing even if the person refuses to accept or pick up their mail. Accordingly, I deemed the male tenant to be served with notification of the claims against him.

Having found both tenants were served, or deemed served, with notification of this proceeding and the claims against them; I continued to hear from the landlord without the tenants present.

Issue(s) to be Decided

1. Has the landlord established an entitlement to recover loss of rent and liquidated damages from the tenants in the amounts claimed?
2. Is the landlord authorized to retain the tenants' security deposit?

Background and Evidence

The one year fixed term tenancy started on August 2, 2016 and was set to expire on August 2, 2017. The tenants were required to pay rent of \$2,150.00 on the first day of every month for rent and \$50.00 for parking. The tenants paid a security deposit of \$1,100.00.

On October 12, 2016 the tenants emailed the landlord to inform her of their intentions to end the tenancy due to a "serious family illness". The landlord received a written notice from the tenants in late October 2016. The landlord responded on several occasions by advising the tenants that they could not end the tenancy by way of a one month notice; that she would try to re-rent the unit but that she would be the tenants responsible for any loss of rent. The landlord started advertising efforts at the end of October 2016. The tenants paid rent for November 2016 and returned the keys in late November 2016.

The landlord seeks compensation of \$8,800.00 from the tenants, plus recovery of the filing fee. This amount is the sum of loss of rent of \$7,700.00 and liquidated damages of \$1,100.00 as provided below.

The landlord submitted that the unit remained vacant for the months of December 2016 through February 2017, causing the landlord to suffer a loss of rent of \$6,450.00 (\$2,150.00 x 3). The unit was re-rented as of March 1, 2017 at a lesser amount of \$1,900.00 per month for the remainder of the fixed term causing the landlord to suffer further loss of \$1,250.00 (\$2,150.00 – 1,900.00 x 5 months). The landlord seeks to recover the loss of rent of \$7,700.00 (\$6,450.00 + \$1,250.00) from the tenants.

The landlord also seeks to recover liquidated damages of \$1,100.00 from the tenants. Term 7 of the Addendum provides as follows:

“Tenant understands that the tenancy agreement is a binding fixed-term lease in accordance with the Residential Tenancy Act. However, the Landlord will consider early termination of the lease with \$1,100 liquidation damages as long as another Tenant is found to take over the suite on the 1<sup>st</sup> day of the consecutive month. Tenant agrees to pay any other damages/expenses from the Security Deposit.”

In an email the landlord sent to the tenant on October 17, 2016 the landlord states “...the penalty to break the lease is forfeiting the security deposit along with November’s rent”. The landlord goes on to state December’s rent will be due unless the landlords find a tenant to occupy the unit for December 1, 2016.

The landlord submitted that she has kept the security deposit for damage to the rental unit and cleaning that she determined were required, loss of rent and liquidated damages.

The landlord provided copies of the tenancy agreement, including the addendum; condition inspection reports; Monetary Order worksheet; written timeline of events; and, numerous emails exchanged between the parties. I ordered the landlord to provide me with a copy of the tenancy agreement for the incoming tenants and examples of advertisements she had placed for the rental unit. The landlord did so promptly after the teleconference call ended and I have considered the additional evidence in making this decision.

### Analysis

Upon consideration of all of the unopposed evidence before me, I provide the following findings and reasons.

Upon review of the tenancy agreement, I accept that the parties entered into a fixed term tenancy agreement set to expire on August 2, 2017. Residential Tenancy Branch Policy Guideline 30: *Fixed Term Tenancies* provides information and policy statements with respect to fixed term tenancies, including how they are ended. The policy guideline provides, in part:

During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties, except under section G below (Early Termination for Family Violence or Long-Term Care).

A tenant may end the tenancy if the landlord has breached a material term of the tenancy agreement. The tenant must give proper notice under the Legislation. Breach of a material term involves a breach which is so serious that it goes to the heart of the tenancy agreement.

A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term except for breach of a material term by the landlord or under section G below (Early Termination for Family Violence or Long-Term Care). Any other one month notice will take effect not sooner than the end of the fixed term.

Under section 45.1 of the *Residential Tenancy Act*, a tenant may give one month's notice to end a fixed-term tenancy early without financial penalty when fleeing family violence or when the tenant has been assessed as requiring long-term care or has been accepted into a long-term care facility. The notice must be accompanied by a confirmation statement that is completed by a person who is eligible to do so under the Residential Tenancy Regulation.

In this case, the tenants communicated to the landlord that they wished to end the tenancy early due to a serious family illness. The tenants do not indicate that it is one of the tenants that is seriously ill and requires long term care. Nor, did the tenants provide a confirmation statement from an eligible person. Accordingly, I find there reference to "serious family illness: is insufficient to end the tenancy with a one month notice.

I am further satisfied by the numerous email messages the landlord submitted that the landlord informed the tenants that they were breaching the fixed term tenancy and would be responsible to pay rent until replacement tenants were found. The tenants still chose to vacate and stop paying rent after November 2016. Accordingly, I am satisfied the landlord acted diligently and the tenants breached their fixed term agreement.

Where a tenant breaches the fixed term tenancy agreement by ending the tenancy early, the landlord may pursue the tenant for any loss of rent for the remainder of the fixed term provided the landlord takes reasonable steps to mitigate loss of rent. Upon review of the landlord's advertising efforts and upon receipt of the tenancy agreement for the replacement tenants, I am satisfied the landlord did so. I find I accept that the unit remained vacant until March 1, 2017 as submitted by the landlord and when it was re-rented it was for a lesser rental rate of \$1,900.00 per month. Therefore, I find the

landlord has satisfied me that the tenants are responsible for her loss of \$7,700.00 and I grant that portion of the landlord's claim.

As for the landlord's request for liquidated damages, I deny the landlord's request for reasons explained below.

Firstly, a liquidated damages clause is to be a genuine pre-estimate of costs for the landlord to re-rent a unit in the event the tenant breaches the fixed term. The clause is not to be a penalty provision and if the provision is a penalty it will not be enforced. Information on liquidated damages is found in Residential Tenancy Branch Policy Guideline 4: *Liquidated damages*. In an email the landlord sent to the tenants, the landlord referred to the liquidated damages as being a penalty in communicating to the tenants that they would be losing their security deposit to satisfy this amount.

Secondly, the wording of the Term 7 in the addendum indicates that the liquidated damages will be payable if the landlord finds a replacement tenant the first day of the next month following the end of the tenancy. It would appear that since the landlord did not secure a replacement tenant for December 1, 2016 the requirement to pay liquidated damages would not apply based on the wording of the term.

Thirdly, Term 7 of the addendum indicates that any damages/expenses will be deducted from the security deposit. Any term that provides for automatic forfeiture or deduction from a security deposit is a violation of section 20(e) of the Act. Section 6 of the Act provides that a term in a tenancy agreement is not enforceable if the term is inconsistent with the Act. I find Term 7 is inconsistent with the Act since it provides for automatic deduction from the security deposit.

The landlord continues to hold the security deposit and I authorize the landlord to retain the security deposit in partial satisfaction of the loss of rent awarded to the landlord with this decision. Since the landlord did not provide evidence in support of damage costs or cleaning costs and a landlord may not automatically keep a security deposit even if there is cleaning required or damage occurs, I find the landlord not entitled to retain the security deposit for such things at this time. Should the landlord seek to recover cleaning or damage costs from the tenants she may do so by filing another Application for Dispute Resolution.

Since the landlord's claim had merit I award the landlord recovery of the \$100.00 filing fee paid for this application.

Provided to the landlord is a Monetary Order to serve and enforce upon the tenants in the net amount calculated below:

Loss of rent	\$7,700.00
Filing fee	100.00
Less: security deposit	<u>(1,100.00)</u>
Monetary Order	\$6,700.00

### Conclusion

The landlord has been authorized to retain the tenants' security deposit and has been provided a Monetary Order in the net amount of \$6,700.00 to serve and enforce upon the tenants.

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: August 17, 2017

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Residential Tenancy Branch