



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNR MNDC MNSD FF

Introduction

This hearing dealt with applications from both the landlord and the tenants pursuant to the *Residential Tenancy Act* ("the Act"). The landlords applied for: a monetary order for unpaid rent 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.

The tenants applied for: authorization to obtain a return of all or a portion of their security deposit pursuant to section 38; authorization to recover the filing fee for this application from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, and to make submissions. Both landlords attended the hearing. The co-tenant/tenant's husband attended on behalf of the tenant and himself. Both parties confirmed receipt of the other's evidentiary submissions for this hearing.

Issue(s) to be Decided

Are the tenants entitled to the return of the security deposit and an amount equal to the security deposit for the landlord's delay in applying to retain their deposit?

Are the landlords entitled to a monetary order as a result of the tenants' early end to the fixed term tenancy? Are the landlords entitled to retain the tenants' security deposit towards any monetary order granted to the landlords?

Is either party entitled to recover the filing fee for this application?

Background and Evidence

This tenancy began on September 1, 2016. A copy of the residential tenancy agreement was submitted as evidence at this hearing. The tenancy was scheduled for a fixed term of 10 months with an option to continue the tenancy on a month to month basis. The rental amount of \$2500.00 was payable on the first of each month. The landlords continue to hold the \$1250.00 security deposit paid by the tenants at the outset of the tenancy. The tenants vacated the rental unit on February 28, 2017.

The tenants sought to recover their \$1250.00 security deposit paid at the outset of this tenancy. The landlords sought a monetary award totalling \$11,000.00 for terminating the tenancy before the end of the fixed term and thereby breaking the lease. The landlords sought four months of rent (\$2500.00) as well as four months of utility bills arguing that the tenants breached their fixed term tenancy agreement and are therefore required to compensate the landlords for their loss. Landlord G testified that he posted an online advertisement for the rental unit on May 19, 2017. Landlord G testified that he and his co-landlord were unable to re-rent the unit until September 1, 2017. Landlord G testified that the rental unit is also the landlords' summer home and that the landlords resided in the unit for July 2017 and August 2017. The landlords submitted that, as a result of the tenants' breach of their lease terms (fixed end date), they were unable to attract a short term tenant for the period prior to their annual vacation.

The co-tenant/husband ("the tenant") testified that he had verbally advised the landlords that the tenants would be vacated the rental unit at the end of April 2017 or in May 2017. The tenant testified that, ultimately, the landlords advised the tenants that they could vacate the unit early if they wanted. The tenant testified that the reason the tenants chose to move out is that both tenants had experienced a variety of serious health issues while residing in the rental unit. The tenant testified that he believes the issues were as a result of the condition of the unit but that he and his wife decided to find another place to live instead of discussing any improvements to the residence with the landlord.

Both parties agreed, in their testimony that the tenants did not seek repairs prior to ending the tenancy. The tenant testified that the tenants did not make attempts to find new tenants for the rental unit because they were not asked to do so. He testified that he would have been willing to find new tenants if it was required of him by the landlords. He testified that he assumed the landlords would want to vet their own renters for their residential rental property.

The landlords testified that there was an ongoing discussion about the date to end the fixed term right at the start of the tenancy. The landlords testified that the tenants were concerned because they were waiting to take possession of a new home. The landlords testified that when the tenants told them that they were having health issues since being in the rental unit, the landlords offer to send in mold remediation experts to address any mold issues within the unit. The landlords testified that the tenants declined the offer.

The landlords testified that since they typically reside in the rental unit for the 2 months of July and August each year rent, their residential rental unit is rented as a 10 month fixed term each year. The landlords testified that, at the time the tenants advised they were moving out (end of February 2017), it was difficult to re-rent because no renters wanted a short term rental.

The landlords testified that the tenants should be required to pay the rent until the end of the fixed term. The landlords submitted that they attempted to mitigate their loss by re-renting but were unable to do so and so, but for the tenants' early move-out the landlords would have been paid rent for the 4 months from March 1, 2017 to June 30, 2017. The landlords sought to recover \$10,000.00 for four months at \$2500.00 per month.

The landlords also testified that the tenants should also be responsible for the utility bills after they vacated the rental unit. While they acknowledged that the tenants had paid the bills in their name during their tenancy, the landlords submit that the tenants should be responsible for the minimal cost of maintaining an empty unit and keeping the utilities in place until the summer. The landlords submitted that their costs included the cost of alarming a vacant house prior to their return in July 2017. The landlords clarified that they do not live in this province and only visit during the two summer months. The landlords sought to recover \$532.45 for four months at approximately \$133.00 per month.

The landlords testified that they did not agree or advise the tenants that they could vacate the rental unit without consequence. The tenant provided undisputed testimony that the landlord responded that it was fine if the tenants moved out. The landlords testified that the tenants were not advised in writing of a mutual agreement and that they did not want to argue with the tenants but that they were not in agreement with the move-out with no further financial obligation. The tenants submitted that the landlords made no effort to re-rent or ask the tenants to re-rent the unit and that it could have been re-rented. The landlords submit that the tenants were ready to move in to their new house and no longer needed their rental, an ulterior motivation to end the tenancy.

Analysis

Policy Guideline No. 4 provides guidance with respect to claims by the landlord for liquidated damages,

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.

The Policy Guideline provides a variety of considerations in determining if a liquidated damages clause is a penalty. Despite the tenant's claim of coercion in signing a fixed term tenancy, I find that the tenants entered into a fixed term tenancy with the landlords of their own volition (without any undue pressure). The evidence before me is that the tenants provided one months' notice before vacating the rental unit prior to the end of the fixed term tenancy. I find that the tenants made their choice to end the tenancy, aware of the lease provisions (included in the residential tenancy agreement signed by both parties) to end the tenancy prior to the fixed end date.

The residential tenancy agreement is clear that this tenancy was intended to continue for 10 months from September 1, 2016 and scheduled to end on June 30, 2017. Residential Tenancy Policy Guideline No. 30 provides direction on the definition and terms of a fixed term tenancy as used in section 44 of the Act:

A fixed term tenancy is a tenancy where the landlord and tenant have agreed that the tenancy agreement will begin on a specified date and continue until a predetermined expiry date...

A fixed term tenancy creates security for both parties to the agreement. Based on all of the evidence submitted at this hearing, the tenants breached the conditions of the residential tenancy agreement and should therefore be required to pay the costs associated with their early end of the tenancy. I accept the undisputed testimony of the landlords that the tenants ended the tenancy prior to its end date without an agreement with the landlord to do so as required by the legislation.

With respect to the landlord's claim to recover four months' rental loss, I note that the tenants provided one months' notice to the landlords and that the landlords had both an

opportunity and an obligation to make efforts to re-rent the unit. While the landlords testified that they placed online advertisements for the rental unit, the landlords did not submit documentary evidence of these advertisements. I find that the landlords did not provide sufficient evidence to prove that the landlords made efforts (through advertisements, showings or other means) to re-rent the unit for the March 2017, April 2017, May 2017 or June 2017.

I find that the landlords' out of province status and their plans to stay in the unit in July and August 2017 created a barrier to re-renting the unit that could not be entirely anticipated by the tenants. I note that the tenant provided largely undisputed testimony that the landlords had local partners who could assist in re-renting the unit thereby mitigating some of their loss. As a result of the lack of evidence from the landlords to prove that they sufficiently mitigated any loss for the four remaining months of the lease agreement, I find that the landlord is entitled to monetary amount to reflect two months' loss. I find that some loss could be anticipated by the tenants in the circumstances however I also find that the landlords could have made further efforts to re-rent the unit. Therefore, I find the landlords are entitled to \$5000.00 to compensate for rental loss as a result of the tenants' actions.

I find that the landlords have not provided proof to the standard required that the utilities, paid by the tenants during their tenancy, were the financial obligation of the tenants after they vacated the rental unit in all of the circumstances. The landlords provided some proof of out of pocket expenditures for the utilities and, given that out of pocket loss shown, I find that the landlords are entitled to a nominal monetary amount to reflect some loss that could be anticipated by the tenants in all of the circumstances. The landlords are entitled to recover \$266.22 for 50% of their claimed costs to maintain the property during the vacancy created by the tenants.

I find that the landlords are entitled to a monetary award as follows,

Item	Amount
Unable to re-rent/rental loss	\$5000.00
Utilities Amnt to be paid by tenants	266.22
Less Tenants' Security Deposit	-1250.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order	\$4116.22

As the landlord was successful in their application, I find that the landlord is entitled to

recover the \$100.00 filing fee paid for this application, as indicated in the calculations above.

Conclusion

I issue a monetary order to the landlord in the amount of \$4116.22.

The landlords are provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenants fail to comply with these Orders, these Orders may be filed in the Small Claims Division of the Provincial Court and enforced as Orders 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: September 18, 2017

Residential Tenancy Branch