



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlords on October 3, 2017 (the "Application"). The Landlords sought compensation for monetary loss or other money owed and reimbursement for the filing fee.

The Landlords appeared at the hearing and provided affirmed testimony. Nobody appeared at the hearing for the Tenant. The hearing process was explained to the Landlords and neither had questions when asked.

The Landlords had submitted documentary evidence prior to the hearing. I reviewed this evidence with the Landlords who confirmed I had received all evidence submitted. The Tenant had not submitted evidence prior to the hearing.

I addressed service of the hearing package and Landlords' evidence. Landlord L.T. said the hearing package and evidence were originally sent by registered mail to the forwarding address provided by the Tenant on the Condition Inspection Report; however, the package was returned. The Landlords said the forwarding address was written on the Condition Inspection Report by the Tenant on September 30, 2017. The Landlords said the Tenant had not provided anything further regarding a forwarding address since. Landlord L.T. said the forwarding address is the address of a lawyer. She said the Landlords attended the address on October 13, 2017 and delivered the package to the lawyer personally. She said the Landlords told the lawyer what the package contained. She said the lawyer accepted the package and provided his business card. The business card is stapled to a Proof of Service submitted as evidence.

Landlord M.D. provided affirmed testimony on the issue of service of the hearing package and evidence. He confirmed the package was personally handed to the lawyer on October 13, 2017. He confirmed he signed the witness statement in the Proof of Service submitted.

The Proof of Service submitted is signed by Landlord L.T. It indicates that the dispute resolution documents were personally delivered to the lawyer for the Tenant at the address provided by the Tenant on the Condition Inspection Report. The witness statement is signed by Landlord M.D. and indicates that he witnessed Landlord L.T. give an envelope to the lawyer for the Tenant on October 13, 2017.

The Landlords submitted a copy of the Condition Inspection Report. On page three the "Tenant's Forwarding Address" is completed as care of the lawyer at an address that matches the lawyer's address on his business card.

I accept the undisputed testimony of the Landlords that the Tenant provided her forwarding address on the Condition Inspection Report. Based on the Condition Inspection Report, and business card of the lawyer attached to the Proof of Service, I find the Tenant provided her forwarding address as being care of the lawyer at his office. Based on the undisputed evidence of the Landlords, I accept the hearing package and evidence were delivered personally to the lawyer at his office on October 13, 2017. This is supported by the Proof of Service signed by Landlord L.T. and witnessed by Landlord M.D. Based on the undisputed testimony of the Landlords, I accept that the lawyer was advised of the contents of the package and accepted the package.

Section 89(1) of the *Residential Tenancy Act* (the "*Act*") sets out the methods of service allowed by the *Act* for a dispute resolution application. Section 88 of the *Act* sets out the methods of service allowed by the *Act* for evidence. Section 71(2)(c) of the *Act* allows me to find that a document is sufficiently served for the purposes of the *Act* despite it not being served in accordance with section 88 or 89 of the *Act*.

Pursuant to section 71(2)(c) of the *Act*, I find the hearing package and evidence were sufficiently served on the Tenant. The Tenant chose to list the lawyer and his office address as her forwarding address on the Condition Inspection Report. The Landlords relied on this and personally served the package on the lawyer at the address given. The lawyer was advised of the contents of the package and accepted the package.

Given I was satisfied with service, I proceeded with the hearing in the absence of the Tenant. The Landlords were given an opportunity to present all relevant evidence, make relevant submissions and ask relevant questions. I have considered all testimony provided and reviewed all documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

I note that the Landlords submitted further evidence on the day of the hearing being letters from the Tenant to the Landlords. I have not reviewed this evidence as I find the undisputed evidence of the Landlords sufficient. I will not refer to these letters in my decision.

Issue to be Decided

1. Are the Landlords entitled to compensation for monetary loss or other money owed?

Background and Evidence

The Landlords sought \$348.00 based on a liquidated damages clause in the tenancy agreement and \$90.00 for cleaning costs incurred upon move-out.

\$348.00 – liquidated damages

The Landlords testified the Tenant moved out of the rental unit September 30, 2017.

The Landlords submitted a written tenancy agreement. The agreement was between the Landlords and Tenant regarding the rental unit. The tenancy was for a fixed term of 12 months starting April 14, 2017 and ending April 30, 2018. The rent was \$695.00 per month due before the first day of each month. The security deposit was \$347.50 which Landlord L.T. said the Tenant paid April 5, 2017. The agreement was signed by the Tenant on April 5, 2017 and Landlord L.T. on April 12, 2017.

The tenancy agreement included the following clause: "In the event that the Tenant(s) wishes to end the tenancy prior to the end of the lease term, both parties must agree in writing to end the 12-month lease period at an earlier date. Should the Landlord agree to terminate this lease prior to the expiry date on April 30, 2018, the Tenant(s) will be required to provide a minimum of two (2) month's notice (calendar months) to end the tenancy. In addition, the Tenant(s) is required to pay \$348.00 as liquidated damages to cover administrative costs – this is not a penalty. Payment of liquidated damages is due at the same time that written notice of intent to vacate is submitted". The Landlords said it is the Tenant's initials underneath this clause.

The Landlords submitted a letter from the Tenant to Landlord L.T. dated August 22, 2017. The Landlords confirmed this letter was the notice from the Tenant breaking the lease early. The letter states it is notice from the Tenant regarding vacating the rental unit on September 30, 2017. The Tenant alleges there have been breaches of the tenancy agreement including breaches of quiet enjoyment and notice of entry. The Landlords said the Tenant did not have authority under the *Act* to end the tenancy early.

I asked the Landlords if they received written notice from the Tenant regarding the breaches alleged in the August 22 letter prior to this letter. Landlord L.T. testified about a letter from the Tenant dated August 14, 2017 regarding section 29 of the *Act* and entry into the rental unit. She said this letter did not give a timeline for the alleged breaches to be remedied. Landlord L.T. testified about a second letter from the Tenant dated August 21, 2017 regarding section 28 of the *Act* and the right to quiet enjoyment. She said this letter did not give a timeline for the alleged breaches to be remedied.

Landlord L.T. said she reviewed the tenancy agreement with the Tenant in detail. Landlord L.T. said they give tenants a copy of the agreement in advance so they can review it. In relation to the liquidated damages clause, Landlord L.T. said there was a discussion between her and the Tenant about the clause when the tenancy agreement was signed. She said the Tenant is from England and there was a question about whether the Tenant would stay. She said there was a discussion about the Tenant being allowed to break the lease if she chose to leave but that the liquidated damages clause would apply. Landlord L.T. pointed out that the Tenant had to initial the liquidated damages clause.

The Landlords said the amount of the liquidated damages represents the cost of re-renting the unit. The Landlords said this cost includes advertising, screening potential renters, showing the rental unit and processing paperwork. The Landlords said Landlord M.D. employs Landlord L.T. to handle these tasks and pays for her time to do these tasks. The Landlords said the amount is based on prior experience and knowledge of the tasks that must be done, and the time it takes to do them, when a tenancy ends.

The Landlords submitted a letter from Landlord L.T. to the Tenant dated August 3, 2017. This letter addresses concerns raised by the Tenant. It includes a statement that the Landlords would be willing to release the Tenant from the tenancy "under the terms and conditions listed within the terms of" the lease.

The Landlords submitted a letter from Landlord L.T. to the Tenant dated August 25, 2017. This letter indicates that the Landlords received the notice to end tenancy from the Tenant and are requesting the liquidated damages of \$348.00.

The Landlords submitted a letter from Landlord L.T. to the Tenant dated September 14, 2017. This letter relates to the end of the tenancy. It states that the Tenant is required to pay the \$348.00 in liquidated damages.

The Landlords said there was never any written agreement or written indication from the Landlords to the Tenant that the liquidated damages clause would not apply.

The Landlords testified that a mutual agreement to end the tenancy was signed by the parties on September 30, 2017 to release the Tenant from the fixed term tenancy. A copy of the mutual agreement was submitted as evidence.

\$90.00 – cleaning costs

Landlord L.T. said the Landlords still hold the entire amount of the security deposit. The Landlords confirmed the Application was filed October 3, 2017. The Landlords said the Tenant did not agree that the Landlords could keep some or all of the security deposit at the end of the tenancy.

The Landlords submitted a Condition Inspection Report. The report indicates that numerous areas of the rental unit were in good condition upon move-in and dirty upon move-out. The Landlords confirmed the report accurately outlines the areas of the rental unit that were dirty upon move-out.

The Landlords confirmed a move-in inspection was done April 14, 2017. The Landlords said Landlord M.D. and the Tenant participated in the move-in inspection. The Landlords confirmed the unit was empty at the time. The Landlords said both parties signed the report on move-in. The Landlords said Landlord L.T. gave the Tenant a copy of the report on April 16, 2017. The Landlords did not know if the report was sent by registered mail or hand delivered to the Tenant.

The Landlords said a move-out inspection was done September 30, 2017 and that the Landlords and Tenant participated in this. The Landlords said the unit was empty. The Landlords said Landlord L.T. signed the Condition Inspection Report on move-out. The Landlords said the Tenant refused to sign the report in the space provided but signed it in two places above the space provided. The Landlords pointed out the Tenant's signature on the report. The Landlords said a copy of the report was mailed to the Tenant at the forwarding address provided but was returned. The Landlords said a copy was also emailed to the Tenant; however, she never responded to the email.

In relation to the Condition Inspection Report, under "Start of Tenancy" and section Y, there is a check mark indicating the Tenant agrees the report fairly represents the condition of the rental unit but also a check mark indicating the Tenant does not agree with this. The Landlords said the check mark indicating the Tenant does not agree the report fairly represents the condition of the rental unit was accidentally made by the Tenant on move-out. This is also noted on the report by Landlord L.T. I understood the Landlords' testimony to be that the Tenant meant to check the box below under "End of Tenancy". Under "End of Tenancy" and section Z, the report states that \$348.00 is payable for liquidated damages and "unit in need of a thorough cleaning – bathroom, kitchen...cabinets, marks on walls – cleaner required –

cost of \$120.00". Under section Z, the Tenant has indicated she does not agree that the report fairly represents the condition of the rental unit and states "some things not checked prior to move therefore able to agree as was not shown prior to move in. Unable to discuss due to verbal abuse from" Landlord L.T. This statement is signed by the Tenant. Further down, the Tenant states that she does not agree with the suggested deductions from the security deposit. This statement is signed by the Tenant.

The Landlords said the Tenant admitted during the move-out inspection that she had not cleaned the rental unit. The Landlords said behind the appliances, the blinds and the window tracks had to be cleaned. The Landlords said there was mould and mildew in the window tracks.

The Landlords submitted an invoice from the person who cleaned the rental unit. The invoice indicates the cleaning took four-and-a-half hours and included cleaning of windows and tracks, kitchen, floors, baseboards and bathroom. The invoice lists the cost of cleaning as \$20.00 per hour for a total of \$90.00.

The Landlords had submitted written submissions. These reference an invoice for cleaners from April 11, 2017 and state that a full spring clean of the unit was completed just prior to the Tenant's possession date on April 14, 2017. The invoice dated April 11, 2017 was submitted by the Landlords. It relates to the rental unit and indicates that a thorough spring cleaning was done over seven hours.

The Landlords submitted photos of the rental unit to show the condition upon move-out. The quality of the photos is quite poor but they do show some dirt in the unit and marks on the walls.

Analysis

\$348.00 – liquidated damages

Based on the undisputed testimony of the Landlords, and the tenancy agreement submitted, I find the Landlords and Tenant entered a fixed term tenancy starting April 14, 2017 and ending April 30, 2018. Based on the undisputed testimony of the Landlords, and the letter from the Tenant dated August 22, 2017, I find the Tenant gave notice to end the tenancy on September 30, 2017, prior to the end of the fixed term.

Both the *Act* and Residential Tenancy Branch Policy Guidelines address the circumstances in which a tenant can end a fixed term tenancy.

Section 45(3) of the *Act* states:

If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

Policy Guideline 8 deals with breaches of a material term of a tenancy agreement and states in part the following:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:

- that there is a problem;
- that they believe the problem is a breach of a material term of the tenancy agreement;
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable (emphasis added); and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Policy Guideline 30 deals with fixed term tenancies and states in part the following:

During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties, or 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.

I acknowledge that the letter from the Tenant dated August 22, 2017 alleges that the Landlords breached the tenancy agreement. However, I accept the undisputed testimony of the Landlords that the Tenant failed to provide written notice of these alleged breaches that included a timeline for the breaches to be remedied. Therefore, I find the Tenant did not provide the Landlords with a deadline for fixing the alleged breaches in writing and therefore did not comply with Policy Guideline 8. I find the Tenant was not entitled to end the tenancy pursuant to section 45(3) of the *Act* in the circumstances.

Further, the Tenant did not attend the hearing to provide evidence that she had authority under the *Act* to end the tenancy early. I accept the undisputed testimony of the Landlords that the Tenant did not have authority under the *Act* to end the tenancy early. I find the Tenant did not have authority to end the tenancy for cause. Therefore, I find the Tenant was not permitted to end the tenancy as outlined in Policy Guideline 30. I find the Tenant breached the *Act* by ending the fixed term tenancy early without authority to do so.

I accept and acknowledge that the parties signed a mutual agreement to end the tenancy on September 30, 2017. However, this was done after the Tenant provided notice to end the tenancy early. Further, I accept the undisputed testimony of the Landlords that the mutual agreement was signed to release the Tenant from her obligations regarding the rental unit. I do not find that the signing of the mutual agreement in these circumstances changes my analysis that the Tenant ended the tenancy early in contravention of the *Act*.

Based on the undisputed testimony of the Landlords, and the tenancy agreement submitted, I find the Tenant signed the agreement which included the liquidated damages clause set out above. Further, I find

the Tenant initialed this specific clause in the agreement. Based on the undisputed testimony of the Landlords, I accept that there was a discussion between Landlord L.T. and the Tenant about the liquidated damages clause upon the agreement being signed. I find the Tenant was bound by this clause. The clause states that the Tenant must pay \$348.00 if the Tenant ends the tenancy early.

Policy Guideline 4 deals with liquidated damages clauses and states in part the following:

...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.

There are a number of tests to determine if a clause is a penalty clause or a liquidated damages clause. These include:

- 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.

If a liquidated damages clause is determined to be valid, the tenant must pay the stipulated sum even where the actual damages are negligible or non-existent. Generally clauses of this nature will only be struck down as penalty clauses when they are oppressive to the party having to pay the stipulated sum.

I accept the undisputed testimony of the Landlords regarding the reason for the amount of the liquidated damages. I find the reasoning behind the amount to be sound. I accept that the amount is based on the experience of the Landlords regarding the costs associates with ending a tenancy and re-renting the rental unit. I note the amount is just over half of the monthly rent. I do not find this amount to be extravagant or oppressive to the Tenant. Further, I note this amount is not due based on a trivial breach of the tenancy agreement but on what I consider to be a fundamental breach of the agreement and the *Act*. I do not find this amount to be a penalty. In these circumstances, I find the liquidated damages clause is valid. The Tenant must pay the Landlords \$348.00 as indicated in the clause. The actual damage or loss suffered by the Landlords is not relevant in these circumstances.

Based on the above, I find the Landlords are entitled to compensation in the amount of \$348.00 based on the liquidated damages clause.

\$90.00 – cleaning costs

Based on the undisputed testimony of the Landlords, and the Condition Inspection Report submitted, I find neither party extinguished their rights relating to the security deposit under sections 24 or 36 of the *Act*. I accept the undisputed testimony of the Landlords that the Tenant provided her forwarding address on the report on September 30, 2017. This is supported by the Condition Inspection Report submitted. The Landlords filed the Application on October 3, 2017, within the time limit set out in section 38(1)(d) of the *Act*.

Section 37 of the *Act* states that a Tenant “must leave the rental unit reasonably clean” upon vacating.

Section 7(1) of the *Act* states that a party that does not comply with the *Act* must compensate the other party for damage or loss that results. Section 7(2) of the *Act* states that the other party must mitigate the damage or loss.

Section 67 of the *Act* states that “...if damage or loss results from a party not complying with this *Act*...the director may determine the amount of, and order that party to pay, compensation to the other party”.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the *Act*, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Section 21 of the *Residential Tenancy Regulation* (the “*Regulations*”) states that in “dispute resolution proceedings, a condition inspection report completed in accordance with this Part is evidence of the state of repair and condition of the rental unit or residential property on the date of the inspection, unless either the landlord or the tenant has a preponderance of evidence to the contrary”.

Based on the Condition Inspection Report, and section 21 of the *Regulations*, I find the condition of the rental unit was good when the Tenant moved in. I note this is supported by the written submissions of the Landlords and the invoice showing the rental unit was cleaned for seven hours prior to the Tenant moving in. Based on the undisputed testimony of the Landlords, and the Condition Inspection Report submitted, I find the Tenant checked that she agreed the report fairly represented the condition of the rental unit on move-in.

Based on the undisputed testimony of the Landlords, and the Condition Inspection Report submitted, I find the rental unit was dirty upon the Tenant moving out. I accept and acknowledge that the Tenant wrote on the report that she did not agree with it. However, section 21 of the *Regulations* requires a party who disagrees with the Condition Inspection Report to provide a preponderance of evidence showing the report is inaccurate. The Tenant did not appear at the hearing to provide any evidence to show that the report is inaccurate. If the Tenant disagreed with the report, the Tenant should have appeared at the hearing and provided evidence on this point. In the absence of evidence to the contrary, I find the report is accurate.

I accept the undisputed testimony of the Landlords regarding the areas of the rental unit that had to be cleaned on move-out. Based on the invoice from the cleaner submitted, I accept that the windows, window tracks, kitchen, floors, baseboards and bathroom had to be cleaned. Further, I accept the

cleaning took four-and-a-half hours. I find the photos submitted support the Landlords' testimony to some extent although the quality of the photos is quite poor.

Based on the evidence, I find the Tenant breached section 37 of the *Act* by not leaving the rental unit reasonably clean upon move-out. I find damage or loss has resulted from this breach as the Landlords had to hire a cleaner to clean the rental unit. Pursuant to section 7(1) of the *Act*, I find the Tenant must compensate the Landlords for this damage or loss. I find the Landlords have proved the amount of the damage or loss by submitting the invoice from the cleaner indicating the Landlords paid the cleaner \$90.00 for her services. I find the Landlords complied with section 7(2) of the *Act* and mitigated the damage or loss by hiring a cleaner that charged the reasonable price of \$20.00 per hour for cleaning the rental unit. Pursuant to section 67 of the *Act*, I order the Tenant to pay the Landlords \$90.00 as compensation for the damage or loss caused by her breach of the *Act*.

Given the Landlords were successful in this application, I grant them reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

In total, I find the Landlords are entitled to compensation in the amount of \$538.00 being \$348.00 for liquidated damages, \$90.00 as compensation for cleanings costs and \$100.00 for reimbursement for the filing fee. Pursuant to section 72(2) of the *Act*, I authorize the Landlords to retain the entire security deposit amount of \$347.50. Further, I grant the Landlords a Monetary Order in the amount of \$190.50.

Conclusion

The Landlords are entitled to compensation in the amount of \$538.00. The Landlords are authorized to retain the entire security deposit amount of \$347.50. The Landlords are granted a Monetary Order in the amount of \$190.50. This Order must be served on the Tenant as soon as possible. If the Tenant fails to comply with this Order, it 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 *Act*.

Dated: May 29, 2018

Residential Tenancy Branch