



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding EAGLESON PROPERTIES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNSD, FFT, MNDCL-S, FFL

Introduction

This hearing involved cross applications made by the parties. On April 16, 2018, the Tenant made an Application for Dispute Resolution seeking a Monetary Order for a return of the security deposit pursuant to section 38 of the *Act* and seeking to recover the filing fee pursuant to section 72 of the *Act*.

On April 18, 2018, the Landlord made an Application for Dispute Resolution seeking a Monetary Order for compensation for liquidated damages and to apply the security deposit towards this debt, pursuant to section 67 of the *Act*. The Landlord is also seeking to recover the filing fee pursuant to section 72 of the *Act*.

The Tenant and Landlord attended the hearing and all in attendance provided a solemn affirmation.

The Tenant advised that she did not serve the Landlord the Notice of Hearing package as she had just started a new job and did not get a chance to do so. As the Tenant did not serve the Landlord her Notice of Hearing package as per Rule 3.1 of the Rules of Procedure, I am dismissing the Tenant's claim for a return of double the deposit.

The Landlord advised that she served the Notice of Hearing package to the Tenant by registered mail, and the Tenant confirmed receipt of this package. Based on this oral testimony, and in accordance with sections 89 and 90 of the *Act*, I am satisfied that the Tenant was served with the Landlord's Notice of Hearing package.

All parties acknowledged the evidence submitted and were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issue(s) to be Decided

- Is the Tenant entitled to a return of her security deposit pursuant to section 38 of the *Act*?
- Is the Tenant entitled to recover the filing fee pursuant to section 72 of the *Act*?
- Is the Landlord entitled to a monetary award for liquidated damages and to apply the deposit towards this debt, pursuant to section 67 of the *Act*?
- Is the Landlord entitled to recover the filing fee pursuant to section 72 of the *Act*?

Background and Evidence

The Landlord stated that the tenancy was set to commence on April 1, 2018 as a fixed term tenancy for a period of one year. Rent was established at \$1,200.00 per month, due on the first day of each month. A security deposit of \$600.00 was also paid. The Tenant confirmed these details.

The Landlord stated that the tenancy agreement was signed on February 2, 2018 but she subsequently discovered in March that the Tenant had intentions of not moving into the rental unit, which was confirmed by email on March 22, 2018. The Landlord immediately advertised the rental unit to mitigate her losses and she found a tenant for April 1, 2018, and during the hearing, she outlined her efforts to re-rent the premises. She then contacted the Tenant on April 3, 2018 to advise her that she was not responsible for the rent. The Landlord advised the Tenant that there was a liquidated damages clause equivalent to compensation in the amount of one month's rent should she break the fixed term early; however, she offered the Tenant a reduction in this amount to a half a month's rent. The Tenant did not agree to this and provided her forwarding address by email on April 4, 2018. Both parties confirmed that they regularly communicated by email and accepted that the Tenant's forwarding address in writing was provided to the Landlord in that email dated April 4, 2018.

The Tenant acknowledged that it was her fault for ending the tenancy and she was remorseful that she did not advise the Landlord first; however, it was her opinion that in the current rental climate, it would not be difficult for the Landlord to re-rent the premises. The Tenant acknowledged that she had read the tenancy agreement; however, she admitted that she did not understand the liquidated damages clause.

The Landlord opposed the Tenant's comments regarding the current rental climate. The Landlord advised that advertising the rental unit, showing it to prospective tenants, and screening applicants is time consuming and takes great effort.

Analysis

Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenant's forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must return the Tenant's security deposit and must pay the Tenant a monetary award equivalent to the original value of the security deposit (section 38(6) of the *Act*). With respect to the return of the security deposit, the triggering event is the latter of the end of the tenancy or the Tenant's provision of the forwarding address.

I find that both parties regularly communicated by email and I accept that the Tenant's forwarding address in writing was provided to the Landlord in an email dated April 4, 2018. I find this is the date which initiated the 15-day time limit for the Landlord to deal with the deposit. The undisputed evidence before me is that the Landlord complied with the requirements of the *Act* by making her Application within this 15-day time frame.

With respect to the Landlord's Application, I find it important to note that Policy Guideline # 4 states that 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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

Based on the evidence before me, I am satisfied that there was a liquidated damages clause in the tenancy agreement that both parties had agreed to and that the genuine

pre-estimate of loss does not meet the tests for establishing this amount as a penalty. Furthermore, the policy guideline states that “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.” In this instance, I find that the efforts that the Landlord went through to re-rent the premises were sufficiently more than “negligible or non-existent” and, in addition, the Landlord sought to reduce this required amount by half. Consequently, I am satisfied that the Landlord has sufficiently established this claim.

As the Tenant was unsuccessful in this application, I find that the Tenant is not entitled to recover the \$100.00 filing fee paid for this application. As the Landlord was successful in this application, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this application. Under the offsetting provisions of section 72 of the *Act*, I allow the Landlord to retain this \$600.00 from the security deposit in full satisfaction of the liquidated damages. Pursuant to sections 67 and 72 of the *Act*, I grant the Landlord a Monetary Order in the amount of \$100.00 to recover the filing fee.

Conclusion

I dismiss the Tenant’s claim for a return of the security deposit. The Landlord is entitled to keep the security deposit and apply it, in full satisfaction, towards the liquidated damages debt. As well, the Landlord is provided with a Monetary Order in the amount of \$100.00 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: June 7, 2018

Residential Tenancy Branch