



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 dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary Order for damage or compensation under the *Act* pursuant to section 67;
- authority to retain the security deposit from the tenant in partial satisfaction of their monetary claim for damage or compensation under the *Act* pursuant to section 38; and
- repayment of the filing fee pursuant to section 72.

The tenants and the landlord's property manager (the "landlord") attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses.

The landlord testified that he served tenant M.T. (the "tenant") with the notice of dispute resolution package by registered mail on May 3, 2018. The landlord provided the Canada Post Tracking Number to confirm this registered mailing. The tenant confirmed receipt of the dispute resolution package. I find that the tenant was deemed served with this package on May 8, 2018, five days after its mailing, in accordance with sections 89 and 90 of the *Act*.

The landlord testified that he served tenant R.A. with the notice of dispute resolution package by registered mail on May 3, 2018. The landlord was unable to provide the Canada Post Tracking Number to confirm this registered mailing. Tenant R.A. testified that he never received the dispute resolution package. I find that tenant R.A. was not properly served with the dispute resolution package in accordance with section 89 of the *Act*. As such and pursuant to section 64 of the *Act*, I have amended the dispute resolution application and removed tenant R.A. from the proceedings.

The tenant testified that her name was spelt incorrectly in the dispute resolution materials. Pursuant to section 64 of the *Act*, I have amended the proceedings to reflect the correct spelling of the tenant's name.

Issue(s) to be Decided

1. Is the landlord entitled to a monetary Order for damage or compensation under the *Act* pursuant to section 67 of the *Act*?
2. Is the landlord entitled to retain the security deposit from the tenant in partial satisfaction of his monetary claim for damage or compensation under the *Act* pursuant to section 38 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenant pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This one-year fixed term tenancy was entered into on April 3, 2018 and possession was to occur on May 1, 2018. On April 9, 2018 the tenant informed the landlord via e-mail messages and a telephone call that she would not be moving into the rental property. The tenant provided formal notice via a written letter advising of same on April 14, 2018. Monthly rent in the amount of \$1,950.00 was to be payable on the first day of each month starting May 1, 2018. A security deposit of \$975.00 was paid by the tenant to the landlord. The tenant never moved into the rental property and the rental property was successfully rented to another tenant for May 1, 2018.

A written tenancy agreement was signed by both parties and a copy was submitted for this hearing. The tenancy agreement included a one-page addendum acknowledged and signed by the tenant. The addendum included the following clause:

"The tenant acknowledge [sic] that a lease cancellation fee of \$975.00 will be charged to the tenant in addition to the damage the Landlord may be entitled to

seek from the tenant under the Residential Tenancy Act, should the tenant request an early termination before the expiry date.”

The tenant testified that when she went in to sign the contract on April 3, 2018, she found out that dogs were not permitted in the rental unit. The tenant operates a dog walking and dog care business and planned to do so out of the rental property. The tenant testified that she started to have a panic attack because she was afraid she would not be able to find another rental property to live in for May 1, 2018 and felt pressured to sign the agreement even though it didn't allow dogs. The tenant testified that she and tenant R.A. signed the tenancy agreement and that she was upset about the agreement for the rest of the day.

The written submissions of the tenant argue that the tenancy agreement should not be upheld due to the emotional state of the tenant at the time of signing.

The landlord testified that the original craigslist advertisement clearly specified that dogs were not permitted at the rental property and that this point was again made clear on April 3, 2018 when the tenant and tenant R.A. came in to sign the lease. The landlord testified that the tenant and tenant R.A. discussed in front of him whether or not they should sign the lease considering the logistical concerns of operating the tenant's business from a rental property that did not allow dogs. The landlord testified that he gave the tenant and tenant R.A. the opportunity to back out of the lease before signing and to not pay the security deposit, but they decided to sign the tenancy agreement anyways.

The landlord testified that as result of the tenant breaking the lease, he incurred the following expenses which he seeks to recover from the tenant:

Item	Amount
Re-leasing and advertising fee from Royal LePage Westside	\$1,076.25
Lease break fee in tenancy agreement	\$975.00
Attending arbitration fee	\$157.50
TOTAL	\$2,208.75

The landlord testified that the \$975.00 lease breaking fee was separate from the re-leasing costs and was a penalty fee for breaking the lease early.

The tenant testified that she thinks the amount of damages sought by the landlord are punitive and that the lease break fee in the tenancy agreement amounts to a penalty, not a genuine pre-estimate of damages from the breach of the lease.

Analysis

The tenant submitted that the tenancy agreement should not be upheld due to the emotional state of the tenant at the time the agreement was signed. While the tenant did not expressly raise a defence of duress, I have interpreted her testimony and submissions as submitting that the tenancy agreement should be set aside because of duress.

The essential elements of duress are stated in *Lei v. Crawford*, 2011 ONSC 349 (CanLII) para. 7, as follows:

Duress involves coercion of the consent or free will of the party entering into a contract. To establish duress, it is not enough to show that a contracting party took advantage of a superior bargaining position; for duress, there must be coercion of the will of the contracting party and the pressure must be exercised in an unfair, excessive or coercive manner.

In this case I find that the landlord did not exert unfair or excessive coercion. He did not force the tenant and tenant R.A. to sign the tenancy agreement and gave them the opportunity to back out of the agreement before signing it. It is not the landlord's responsibility to assess the emotional state of prospective tenants prior to the signing of a tenancy agreement. The tenant and tenant R.A. freely and willingly entered into a contract and are bound by those terms.

Section 16 of the Act states that the rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.

Policy Guideline 4 provides 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. 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.

If the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.

In this case, the landlord testified that the \$975.00 lease break fee was an extra penalty fee that was separate and apart from the fees associated with re-leasing the property. Based on the landlord's testimony, I find that the \$975.00 fee is a penalty clause and is therefore unenforceable. While this penalty clause is unenforceable, as per Policy Guideline 4, it still functions as the upper limit of damages payable resulting from the tenant's cancellation of the lease.

The landlord submitted into evidence an invoice in the amount of \$1,076.25 from Royal Lepage Westside for re-leasing and advertising the property. As the tenant is the cause of this loss for ending the one-year fixed term tenancy agreement early, I would have awarded this sum to the landlord but for the penalty clause. In this case, the penalty clause caps the monetary award to the landlord at \$975.00.

The landlord claimed to recover \$157.50 for the cost of attending arbitration; however, the filing fee for arbitration is only \$100.00. The only amount recoverable for attending arbitration is the \$100.00 filing fee as the tenant's breach of the tenancy agreement did not result in the extra \$57.50. The extra sum of \$57.50 resulted from the landlord's choice to hire an agent to appear on her behalf. I find that the landlord is entitled to recover the \$100.00 filing fee from the tenant.

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's entire security deposit in the amount of \$975.00 in partial satisfaction of his monetary claim for damage and compensation under the *Act* against the tenant.

Conclusion

Pursuant to sections 67 and 72 of the *Act*, I find that the landlord is entitled to retain the tenant's entire security deposit in the amount of \$975.00 in partial satisfaction of his monetary claim against the tenant.

I issue a monetary Order in the landlord's favour in the amount of \$100.00 against the tenant. The landlord is provided with a monetary 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: June 11, 2018

Residential Tenancy Branch