



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL, FFL

Introduction

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

- a monetary order for money owed or compensation for damages or losses under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover his filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

As the tenant confirmed that they received a copy of the landlord's dispute resolution hearing package sent by the landlord by registered mail on November 6, 2017, I find that the tenant was duly served with this package in accordance with section 89 of the *Act*. Since both parties confirmed that they had received one another's written evidence, I find that the written evidence was served in accordance with section 88 of the *Act*.

Issues(s) to be Decided

Is the landlord entitled to a monetary award for losses and damages arising out of this tenancy? Is the landlord entitled to recover the filing fee for this application from the tenant?

Background and Evidence

On February 29, 2016, the parties signed a thirteen month fixed term tenancy agreement (the Agreement) that was to run from March 1, 2016 until March 31, 2017. Monthly rent was set at \$1,160.00, payable on the first of each month. Although the tenant paid a \$550.00 security deposit to the landlord before this tenancy began, a June

14, 2017 decision by another arbitrator appointed pursuant to the *Act* and referenced above allowed the landlord to retain that security deposit.

The parties testified that the landlord issued a 1 Month Notice to End Tenancy for Cause (the 1 Month Notice) in mid-August 2016. The landlord estimated that the effective date for that Notice would have been September 30, 2016. Although the tenant testified that they applied to cancel the 1 Month Notice, the tenant said that they eventually decided to end this tenancy because of ongoing harassment directed at them by the landlord before this fixed term tenancy was scheduled to end. After the landlord testified that an arbitrator appointed under the *Act* heard and allowed the tenant's application to cancel the 1 Month Notice, the tenant confirmed that they had been successful in their application to have the landlord's 1 Month Notice cancelled. The tenant confirmed that they had given the landlord oral notice on October 1, 2016 that they planned to vacate the rental unit by November 1, 2016. The tenant subsequently provided the landlord with a text message on October 15, 2016 to advise that they were planning to vacate the rental unit by November 1, 2016. Despite the landlord's request that the tenant confirm their intention to end this tenancy in writing, the tenant did not do so. The landlord entered into written evidence a copy of the tenant's text message in which the tenant informed the landlord that the tenant was too busy to put their notice to end this tenancy in writing. The tenant also incorrectly maintained in that text message that the text message satisfied the requirement that notice to end this tenancy needed to be in writing. The parties agreed that the tenancy ended on October 31, 2016.

The landlord's current application for a monetary award of \$4,780.00 plus the recovery of the \$100.00 filing fee included the following items listed on the landlord's Monetary Order Worksheet:

Item	Amount
Liquidated Damages	\$1,160.00
Additional Occupant Charge (3 Months @ \$100.00 per month = \$300.00)	300.00
Contacts and Showings	1,000.00
Loss of Rent for 2 Months	2,320.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order Requested	\$4,880.00

At the hearing, I clarified with the parties that the amounts identified in the landlord's current application did not appear to duplicate any of the losses requested or awarded in the June 2017 decision for this tenancy. As the tenant was unclear on this point, I

explained that the liquidated damages claimed by the landlord in the current application were distinct from the landlord's previous June 2017 application for damage that arose during the course of this tenancy.

At the hearing, the landlord's legal counsel cited Residential Tenancy Branch Policy Guidelines 3 (Claims for Rent and Damages for Loss of Rent) and 5 (Duty to Minimize Loss) as supportive of the landlord's application for this monetary award.

The landlord's legal counsel noted that section 5 of the Agreement stated that both parties agreed that the landlord was entitled to a liquidated damages payment of \$1,160.00 in the event that this tenancy ended before the scheduled March 31, 2017 end date for this fixed term tenancy. As the tenancy ended by November 1, 2016, the landlord claimed this pre-set liquidated damages amount.

The landlord testified the tenant's brother stayed in the rental unit in June 2016 "for a bit." The tenant said that since the landlord lived upstairs from the tenant most of their communication was fairly informal and that the landlord had said that it was alright for the tenant's brother to stay with the tenant for "awhile" until he could find alternative accommodations. At the hearing, the landlord testified that they told the tenant that it was "ok" for her brother to stay with the tenant until he could find another place. As the landlord expected that this would be a short term arrangement, the landlord did not pursue additional rent as per section 6 of the Agreement for the month of June 2016. Once it became apparent that the tenant's brother was having difficulty finding another place to live, the tenant started paying an extra \$100.00 each month in rent for this additional occupant as of September 2016. The landlord's application sought a monetary award of \$100.00 in additional rent for each of June, July and August 2016, three months when the tenant's brother was staying with the tenant at the rental unit and the tenant paid no additional rent.

In addition to the liquidated damages claim, the landlord applied for \$1,000.00 to compensate the landlord for the landlord's time in conducting showings and communicating with prospective tenants prior to the scheduled end to this fixed term tenancy. The landlord entered into written evidence a detailed list of dates and times chronicling the attempts to re-rent the premises.

Included in this list, were advertisements for a "brand new renovated" apartment for an asking monthly rent of \$1,300.00. The landlord said that they were eventually able to re-rent the rental unit for \$1,500.00, significantly more than the tenant was paying for the premises. The landlord maintained that there was significant damage to the rental

unit during the tenant's time living there and that the landlord had to spend more than \$8,000.00 in repairs. The landlord's counsel described the increased rental amount that the landlord was able to obtain as a reasonable economic rent for the renovated premises.

The landlord applied for the recovery of two months of rent from the tenant as the landlord could not re-rent the premises in the condition it was in when this tenancy ended due to the extensive damage that required repair and renovation.

The tenant disputed the landlord's claim, maintaining that they should not be held responsible for any further losses beyond those that were allowed by the arbitrator who considered the landlord's previous claim for a monetary award for damage to the rental unit. In the June 2017 decision noted above, that arbitrator allowed the landlord to keep the tenant's \$550.00 security deposit and issued a \$1,093.14 monetary Order for damage arising out of the tenancy. The tenant maintained that the landlord's actions, many of which were outlined in the October 2016 decision cancelling the 1 Month Notice, forced the tenant to end this tenancy early. The tenant asserted that they should not be held responsible for any of the landlord's losses beyond October 31, 2016, the date when the tenant vacated the rental unit. The tenant testified that the landlord was lying about the state of the rental unit at the end of this tenancy and the landlord's interactions with the tenant which led to the tenant's decision to end this tenancy early.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

While the landlord's counsel cited RTB Policy Guidelines 3 and 5 in support of the landlord's claim, RTB Policy Guideline 4 also provides guidance to arbitrators on claims for Liquidated Damages, a central aspect of the landlord's claim. RTB Policy Guideline 4 reads in part as follows:

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement where the parties agree in advance the tenancy agreement providing for the payment of liquidated damages... 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...

In this case, I find that the liquidated damages clause included as section 5 of the Agreement does constitute a genuine pre-estimate of the costs anticipated to be incurred as a result of the tenant's breach of the fixed term tenancy agreement. The tenant signed the Agreement, which included a payment of \$1,160.00, equivalent to one month's rent, in the event that the tenant ended the tenancy prior to the scheduled termination date for the Agreement. As I find no evidence that this provision was a penalty, I allow the landlord's claim for \$1,160.00 in liquidated damages, as set out in the signed Agreement between the parties.

As discussed at the hearing, I find that the landlord's additional application for a monetary award of \$1,000.00 for the time and expense of undertaking showings and advertising of the rental unit prior to the scheduled end to this tenancy is in all important ways included in the liquidated damage claim that was to have been a genuine pre-estimate of all of these types of expenses. I dismiss the landlord's application for a monetary award for "contacts and showings" without leave to reapply as I find these are the very losses that the liquidated damages was intended to look after.

Although the landlord issued a 1 Month Notice, the October 19, 2016 decision of an arbitrator appointed pursuant to the *Act* set aside that Notice. By the time of the hearing of the tenant's application to cancel the 1 Month Notice, the tenant had already given the landlord oral and text message notice that the tenant intended to end the tenancy before the next monthly rent payment was due on November 1, 2016. There is undisputed evidence that the tenant chose to ignore the landlord's request that the tenant put her notice to end this tenancy in writing, a requirement of the *Act*.

Under these circumstances, I find that the tenant was in breach of their fixed term tenancy Agreement because they vacated the rental premises prior to the March 31, 2017 date specified in that Agreement. As such, the landlord is entitled to compensation for losses they incurred as a result of the tenant's failure to comply with the terms of their tenancy Agreement and the *Act*. However, section 7(2) of the *Act* places a responsibility on a landlord claiming compensation for loss resulting from a tenant's non-compliance with the *Act* to do whatever is reasonable to minimize that loss.

There is undisputed evidence that the tenant did not pay any rent for November 2016, and were responsible for doing so. The landlord has applied for a monetary award of \$2,320.00, the equivalent of two month's loss of rent. I accept that the landlord is entitled to a monetary award of \$1,160.00, as the tenant's unwillingness to abide by the requirements of the *Act* and provide written confirmation that the tenant was vacating the premises before November 1, 2016, rendered it impossible for the landlord to undertake efforts to re-rent the premises and thus minimize the tenant's exposure to the landlord's loss of rent for November 2016. Based on the amount of the monetary award for damages issued in the June 2017 decision and the landlord's sworn testimony, I also find that it would have been very difficult for the landlord to have completed repairs to the rental unit in sufficient time to enable the landlord to rent the premises to another tenant for any portion of November 2016. For these reasons, I find that the landlord is entitled to a monetary award of \$1,160.00, to compensate the landlord for loss of revenue for the month of November 2016.

I find the landlord's actions to undergo a significant renovation of the rental unit and only commence efforts to re-rent the premises at a significantly increased monthly rent on November 22, 2016 fall far short of the requirements established by section 7(2) of the *Act* and RTB Policy Guideline 5.

Policy Guideline 5 reads in part as follows:

...The landlord who does not advertise for a new tenant within a reasonable time after the tenant vacates a rental unit...may not be entitled to claim loss of rent for the first month of vacancy;...

In circumstances where the tenant ends the tenancy agreement contrary to the provisions of the Legislation, the landlord claiming loss of rental income must make reasonable efforts to re-rent the rental unit or site at a reasonably economic rent...

I find that there was significant delay in the landlord's advertisement of the availability of the rental unit. Of more concern is the landlord's attempt to obtain a monthly rent of \$1,300.00 for the renovated rental unit, significantly more than the landlord would have been entitled to receive had the fixed term tenancy continued at a monthly base rent of \$1,160.00. Rather than reducing the asking rent to mitigate the tenant's exposure to the landlord's loss of rent, the landlord subsequently increased the monthly rent they were seeking even further to \$1,500.00, an amount agreed to on January 23, 2017 by the tenant who took occupancy on February 1, 2017. Instead of demonstrating a loss, it seems that the landlord received a windfall profit from the tenant's premature ending of this tenancy. The landlord received \$340.00 more each month than the base rent that was being paid by the tenant during her tenancy. Since the tenancy was scheduled to end on March 31, 2017, and the landlord did incur additional expenses in renovating the premises to attract the additional rent, I am not reducing the amount of the landlord's monetary award to reflect this windfall profit for the months of February and March 2017. Were I not convinced that the landlord did incur expenses in renovating the premises, I would seriously consider reducing the amount of the landlord's monetary award by the amount of the additional rent the landlord received for February and March 2017.

In the October 19, 2016 decision regarding the landlord's attempt to end this tenancy for cause, the arbitrator who presided over that proceeding commented as follows with respect to the additional rent that was due as a result of the tenant's brother having moved into the rental unit:

...I am satisfied that the landlord has failed to prove that the tenant has sublet or assigned the rental unit. The tenants live in the rental unit and their brother has moved in. The tenant has been paying the additional occupancy rent as stated in the tenancy agreement...

This portion of the October 19, 2016 decision is consistent with the sworn testimony of the parties, which confirmed that the tenant did pay the extra \$100.00 in rent for the

additional occupant for the months of September and October 2016. Based on a balance of probabilities, I find it more likely than not that the landlord agreed to allow the tenant's brother to stay in the rental unit with the other six family members then residing there for a short period of time while the tenant's brother was seeking alternate accommodation. Once it became apparent that the tenant's brother had been unsuccessful in his efforts to find suitable accommodation elsewhere, the landlord reasonably expected to be compensated for the additional \$100.00 amount identified in the tenancy agreement the parties signed in February 2016. The tenant's payment of the additional \$100.00 for each of September and October 2016 signifies that the tenant had agreed that their brother was no longer a temporary guest but was indeed residing with them. For these reasons, I find that by July 1, 2016, the tenant's brother was living with them. As of that date, I allow the landlord's claim for an additional \$100.00 per month in rent, as per section 6 of the tenancy agreement, until the tenant's rent obligations had expired.

I disallow the landlord's claim for an additional \$100.00 rent payment for the additional occupant for June 2016, as I find that the landlord had likely given his oral permission to allow the tenant's brother to stay with the tenant as a short-term guest for the early stages of the brother's stay with the tenant. I allow the landlord's claim for an additional occupant charge of \$100.00 for each of September, October and November 2016.

As the landlord has been successful in parts of this claim, I allow the landlord to recover the filing fee from the tenant.

Conclusion

I issue a monetary Order in the landlord's favour under the following terms, which allows the landlord to recover losses and damages as well as the filing fee for this application:

Item	Amount
Liquidated Damages	\$1,160.00
Additional Occupant Charge (July and, August 2016 - 2 Months @ \$100.00 per month = \$200.00)	200.00
Loss of Rent for November 2016 (Base Rent of \$1,160.00 + \$100.00 Additional Occupant = \$1,260.00)	1,260.00
Recovery of Filing Fee for this Application	100.00
Total Monetary Order	\$2,720.00

The landlord is provided with these Orders in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: June 08, 2018

Residential Tenancy Branch