



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC-S, MND-S, MNR-S, FF

### Introduction

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

- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement 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;
- authorization to recover their filing fee for this application from the tenants pursuant to section 72.

Both parties attended the hearing via conference call and provided affirmed testimony. Both parties confirmed that the landlords served the tenants with the notice of hearing package and the submitted documentary evidence via Canada Post Registered Mail. Both parties also confirmed that the tenants served the landlords with the submitted documentary evidence via email on June 6, 2017 as requested by the landlords. As both parties have attended and have confirmed receipt of the notice of hearing package and the submitted documentary evidence, I am sufficiently satisfied that both parties have been served as per section 90 of the Act.

### Issue(s) to be Decided

Are the landlords entitled to a monetary order for unpaid rent, for damage, for money owed or compensation for damage or loss and recovery of the filing fee?

Are the landlords entitled to retain all or part of the security deposit?

### Background and Evidence

While I have turned my mind to all the documentary evidence, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of the applicant's claim and my findings are set out below.

This tenancy began on March 1, 2017 on a fixed term tenancy ending on February 29, 2018 and then thereafter on a month-to-month basis as shown by the submitted copy of the signed tenancy agreement dated February 17, 2017. The monthly rent was \$1,675.00 payable on the 1<sup>st</sup> day of each month. A security deposit of \$850.00 and a pet damage deposit of \$850.00 were paid on February 17 and 19 of 2017. A condition inspection report for the move-in was completed by both parties on February 17, 2017 and a move-out report was made by the landlords in the absence of the tenants on December 14, 2017.

The landlords seek a monetary claim of \$2,710.00 which consists of:

\$850.00	Unpaid Rent, ½ month for December 2017
\$1,700.00	Liquidated Damages
\$135.00	Carpet Cleaning
\$25.00	NSF Charge, Stop Payment on December 2017 Rent Cheque

The landlords claim that the tenants ended the tenancy on December 14, 2017. The tenants submitted documentary evidence that the tenants provided written notice to end the tenancy on November 27, 2017 for December 31, 2017. The landlords claim that the tenants "stopped payment" on the December 2017 rent cheque. Both parties agreed that the tenants obtained new tenant to begin occupancy on December 15, 2017. The tenants confirmed that the December 2017 rent was not paid and agrees to the ½ months' rent of \$850.00 for the period December 1 to 14, 2017.

The landlords also claim liquidated damages of \$1,700.00 as outlined in the signed tenancy agreement. The landlord claims that this is for his time to find new tenants by valuing his time at \$150.00 an hour for approximately 11.33 hours. The landlord claims that he valued this hourly rate as a realtor (actual occupation) in his role to re-rent the premises for the period of time between November 27 to December 15, 2017 where he had 27 contacts with the tenants and prospective new tenants regarding re-renting the premises. The landlord relies upon a submitted typed 4 pages with include a statement detailing the process of obtaining a new tenant and a 3 page summary of events from November 27, 2017 to December 15, 2017 regarding their communications to end the tenancy and efforts to find a new tenant. The tenants dispute this claim stating that the landlords failed to mitigate any possible losses by trying to find a new tenant. The tenants argued that all reasonable efforts to obtain a new tenant were made by the tenants as free online advertising, showings and initial interviews were made by the

tenants and not the landlords. The tenants provided undisputed testimony that over 40 prospective tenants were reviewed by the tenants before the landlords accepted the successful new tenants.

The landlords also claim that the tenant vacated the premises leaving the carpets dirty requiring cleaning. The landlords have provided a copy of a processed cheque for \$135.00 to a cleaning company (A.E.S.) dated December 17, 2017 and a copy of an online advertisement from the same company. The tenants confirmed and agreed with this portion of the landlord's claims stating that insufficient time prevented the tenants from the carpet cleaning.

The landlord clarified their request for recovery of a \$25.00 administrative fee for a "stop payment" rent cheque for December 2017. The landlord stated that signed tenancy agreement allows for a \$25.00 administrative fee when a rent cheque is returned or processed as NSF. The tenants confirmed and agreed to this portion of this claim. No further comment was offered by the tenants.

### 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. In this case, the onus is on the landlord to prove on the balance of probabilities that the tenant caused the damage and that it was beyond reasonable wear and tear that could be expected for a rental unit of this age.

In this case, the landlords' claims for:

\$850.00	Unpaid Rent for December 2017
\$135.00	Carpet Cleaning
\$25.00	Administrative Returned Rent cheque

Have been confirmed and accepted by the tenants. As such, the landlords have established a claim of \$1,010.00.

On the landlords' claim for liquidated damages of \$1,700.00, I find that the landlords have failed. Residential Tenancy Branch Policy Guideline #4, Liquidated Damages states,

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

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. Further, 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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.

The landlords have submitted that 11.33 hours were spent by the landlord, H.N. in his efforts to mitigate any possible losses by re-renting the premises. The landlord stated that this claim was based upon \$150.00 an hour for the \$1,700.00 claim as a realtor. The landlords claim that his time is valued as a realtor at the \$150.00 an hour when he acts as a landlord.

Residential Tenancy Branch Policy Guideline #5, Duty to Minimize Loss states in part,

Where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss<sup>1</sup>. This duty is commonly known in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided.

The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation<sup>2</sup>. Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed. The arbitrator may require evidence such as receipts and estimates for repairs or advertising receipts to prove mitigation. ..

In this case, the landlords have claimed that the landlords valued time was spent searching and obtaining a new tenant as shown in the submitted 3 pages chronological summary of the landlords' efforts. The tenants have argued that the only substantive evidence is that provided by the tenants. The tenants have referred to the numerous online advertisements and showings to provide the landlord with a viable replacement. The landlords failed to provide any substantive evidence of how the landlords' hourly

rate of \$150.00 as a realtor applied in this case as he was not acting as a realtor. I also note that the agreed upon liquidated damages amount (\$1,700.00) exceed the monthly rent of \$1,675.00. The landlords failed to provide sufficient details of how the 11.33 hours @ \$150.00 an hour was an accurate pre-estimate (at the start of the tenancy) for the liquidated damages. I find that no losses occurred as the landlords have not provided sufficient evidence of any expenses or losses associated with re-renting the premises. The only details provided were those of their communications via email and text messages. As such, this portion of the landlords claim is dismissed.

The landlords have established a total monetary claim of \$1,010.00. Having been partially successful, the landlords are entitled \$50.00 for recovery of the filing fee. In offsetting this claim against the currently held \$850.00 security deposit and the \$850.00 pet damage deposits, the tenants are entitled to a monetary order for the balance due of \$640.00.

### Conclusion

The tenants are granted a monetary order for \$640.00.

This order must be served upon the landlords. Should the landlords fail to comply with this order, the 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 21, 2018

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Residential Tenancy Branch