



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 an Application for Dispute Resolution by the Landlord filed under the *Residential Tenancy Act* (the “Act”), for a monetary order for losses, permission to retain the security deposit, and to recover the cost of the filing fee for this application.

Both the Landlord and Tenant attended the hearing and were each affirmed to be truthful in their testimony. They were both provided with the opportunity to present their evidence orally and in written and documentary form, and to make submissions at the hearing. The parties testified that they exchanged the documentary evidence that I have before me. The Landlord and the Tenant were each affirmed to be truthful in their testimony.

I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter is described in this Decision.

Issue(s) to be Decided

- Are the Landlords entitled to monetary compensation for damages under the *Act*?
- Are the Landlords entitled to retain the security deposit in partial satisfaction of the claim?
- Are the Landlords entitled to the return for their filing fee for this application?

Background and Evidence

Both parties agreed they signed a one-year fixed term tenancy that began on September 1, 2017. Rent in the amount of \$900.00 was payable on the first of each

month, and the Tenant paid a security deposit of \$450.00 at the outset of the tenancy. The Landlord provided a copy of the tenancy agreement into documentary evidence.

Both parties agreed that the Tenant ended his tenancy early when he gave notice, on March 27, 2018, to end the tenancy as of April 30, 2018. The Tenant vacated the rental unit on April 30, 2018, and both parties agreed that the move-out inspection had been conducted and that the rental unit had been returned to the Landlord in good condition.

The Tenant testified that he disagreed with the Landlord, regarding the liquidated damages clause in his tenancy agreement stating that the \$860.00 was a penalty, not a true estimation of what it costs to re-rent the unit. The Tenant stated that he agreed he did end his tenancy early but that he felt that a half a month's rent was a reasonable amount to cover the Landlord true costs associated to him ending the tenancy early. The Tenant provided a copy of the ad posted by the Landlord on a free listing site into documentary evidence, stating that the landlord had no costs associated to advertising the rental unit.

Landlord stated that they are looking for the full \$860.00 in liquidated damages that were contracted to in the tenancy agreement and an addition \$58.50 in lost rental income due to the new renter not taking over the rental unit until May 3, 2018. The Landlord testified that the new renter was charged rent on a per diem basis from May 3 to May 31, 2018.

The Landlord testified that the \$860.00 liquidated damages charge covered advertising costs, showing the rental unit, conducting the inspection of the rental unit and for repairing and repainting the rental unit for the new tenant. The Landlord was not able to provide a breakdown of the cost to re-rent this rental unit, but she did confirm that the Landlord advertises the available rental units on the site noted by the Tenant in his documentary evidence.

Analysis

Based on the above, the testimony and evidence, and on a balance of probabilities, I find as follows:

I find that the parties entered into a one-year fixed term tenancy, beginning on September 1, 2017, in accordance with the *Act*.

Section 45(2)(b) of the *Act* states that a tenant cannot end a tenancy agreement earlier than the date specified in the tenancy agreement.

Tenant's notice

45(2) A tenant may end a fixed term tenancy by giving the landlord notice to end the tenancy effective on a date that

- (a) is not earlier than one month after the date the landlord receives the notice,
- (b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy, and
- (c) is the day before the day in the month, or in the other period on which the tenancy is based, that rent is payable under the tenancy agreement.

I find that the tenancy could not have ended in accordance with the *Act* until August 31, 2018. I find that the Tenant failed to comply with the *Act* when he issued his notice to the Landlord to end his tenancy as of April 30, 2018.

I accept the Landlord's testimony that she attempted to rent the unit as soon as possible, and was able to find a new renter for the rental unit as of May 3, 2018, and that the Landlord had a loss of rental income for two days in May 2018. Therefore, I find the Landlord has established an entitlement for the recovery the loss of rental income for two days, at the per diem rate of \$29.03, for a total of \$58.06.

The Residential Tenancy Policy Guideline # 4 speaks to liquidated damages. It states:

"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.”

I find the sum of the liquidated damages in the tenancy agreement to be extravagant in comparison to the genuine loss testified to by the Landlord, following the Tenant's breach of this tenancy agreement. Therefore, I find the liquid damages clause of this tenancy agreement to constitute a penalty.

I found the Tenant's offer to the Landlord of a half month's rent, as liquidated damages reasonable and in accordance with the Residential Tenancy Policy Guideline on liquidated damages. Therefore, I will award the Landlord the equivalent of a half month's rent for liquidated damages.

As the Landlord has been partially successful in this application, I find that the Landlord is entitled to recover their filing fee paid for this application.

Pursuant to section 38 and 67 of the *Act*, I grant the Landlord a monetary order in the amount of \$158.06. The Order is comprised of \$58.06 in lost rental income for two days in May 2018, \$450.00 in liquidated damages, and the recovery of the \$100.00 filing fee paid for this application, less \$450.00 that the Landlord holds in a security deposit from the Tenant.

<u>Awarded Item's</u>	<u>Due</u>
Rental income	\$58.06
Liquidated damages	\$450.00
	\$508.06
Security Deposit	-\$450.00
	\$58.06
Filing fee	\$100.00
Due	\$158.06

Conclusion

I find for the Landlord pursuant to sections 67 and 72 of the Act.

I grant the Landlord a **Monetary Order** in the amount of **\$158.06**. The Landlords are provided with this 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: July 19, 2018

Residential Tenancy Branch