



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: MNDCL MNSD FFL FFT

Introduction:

This hearing was granted on a Review Consideration Decision in July 2018. The landlord did not attend the original hearing on July 4, 2018. Today, both parties attended the hearing and gave sworn or affirmed testimony. Each confirmed receipt of the tenant's Notice to End Tenancy dated March 27, 2018 and of each other's Application for Dispute Resolution and Notice of the Review Hearing. I find the documents were legally served pursuant to sections 88 and 89 of the Act for the purposes of this hearing. The landlord applies pursuant to the *Residential Tenancy Act* (the Act) for orders as follows:

- a) A monetary order for \$6750 (less \$2100 held in her account) pursuant to Sections 45, 46 and 67 for rental loss and liquidated damages pursuant to early termination of a fixed term lease;
- b) To retain the security and fob deposits to offset the amount owing; and
- c) An order to recover the filing fee pursuant to Section 72.

The tenant applies pursuant to the Act for orders as follows:

- d) For a return of twice the security deposit pursuant to section 38;
- e) For a refund of the rent paid for June 2018 in the amount of \$1350;
- f) To find the lease ended on May 31, 2018 as they paid the liquidated damages of \$1200 required by the lease and the landlord agreed it was at an end;;and
- g) To recover the filing fee for this review application and her original application.

Issue(s) to be Decided:

Has the landlord proved on the balance of probabilities that they are entitled to rental loss and liquidated damages? If so, what is the amount of the compensation and is the landlord entitled to recover filing fees also?

Is the tenant entitled to twice the security deposit refunded, to the refund of their June rental cheque and to recover filing fees for the application?

Background and Evidence:

Both parties attended the hearing and were given opportunity to be heard, to present evidence and to make submissions. It is undisputed that the tenancy commenced in September 1, 2016 on a fixed term lease to September 30, 2017, that rent was \$1350 a month and a security deposit of \$675 plus a key fob deposit of \$75 was paid. It is undisputed that the tenant gave notice that they were ending the tenancy and vacated on April 25, 2017. The tenant explained that the student tenant was in a co-op program and understood he would have work locally in the summer as part of his program. However, it was not available. It is undisputed that the tenants paid \$1200 in liquidated damages to the landlord as required by the lease and also paid rent for May 2017. They said they understood from email exchanges with the landlord that this would satisfy their obligation under the lease and the landlord would treat it as at an end. They also tried to obtain new tenants for the landlord and forwarded some names but they claim the landlord did not reply to the prospects.

The landlord said the tenants had a 13 month fixed term lease for she was going to another country for that time. She said she had many applicants but she rented to these tenants for she was assured they would stay for the 13 months. She denies she ever considered the lease at an end and says the tenants could have sublet but did not. She never re-rented for she said the market was very low in summer in this university area and it was hard to contact applicants by phone due to the time difference between where she was living and British Columbia. However, she said she did contact people but they did not respond although she lowered the rent a little. She said the tenants failed to find another tenant or pay an agent to find one so are responsible under the fixed term tenancy agreement. She did not pay an agent to try to re-rent but said a friend was helping her. She was only offering the unit for 4 months as she was coming back so this made it more difficult.

On the basis of the documentary and solemnly sworn evidence presented at the hearing, a decision has been reached.

Analysis:

Awards for compensation are provided in sections 7 and 67 of the *Act*. Accordingly, an applicant must prove the following:

1. That the other party violated the *Act*, regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Director's orders: compensation for damage or loss

67 Without limiting the general authority in section 62 (3) [*director's authority respecting dispute resolution proceedings*], if damage or loss results from a party not complying with this Act, the regulations or a tenancy agreement, the director may determine the amount of, and order that party to pay, compensation to the other party.

Section 67 of the Act does *not* give the director the authority to order a respondent to pay compensation to the applicant if damage or loss is not the result of the respondent's non-compliance with the Act, the regulations or a tenancy agreement.

Monetary Order:

The onus is on each applicant to prove on a balance of probabilities their claim. I find the weight of the evidence is that the tenant violated the Act and their tenancy agreement by breaching a fixed term lease. Section 45(2) of the Act provides

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

(b) is not earlier than the date specified in the tenancy agreement as the end of the tenancy.

I find that although the tenant gave a one month notice to end their tenancy on March 27, 2017, it was not legally effective until September 30, 2017 so they remained responsible for the rent until the end of their tenancy unless the landlord elected to accept the end of the tenancy. The clause in their lease reads:

5. *Liquidated Damages: If the tenant ends the fixed term tenancy before the end of the original term..., the landlord may, at the landlord's option, treat this agreement as being at an end. In such event, the sum of \$1200 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the rental unit. The landlord and tenant agree that the payment of liquidated damages will not preclude the landlord from exercising any further right of pursuing another remedy available in or in equity, including but not limited to, damage to the rental unit...and damages as a result of lost rental income due to the tenant's breach of any term of this agreement.*

I find the tenant paid \$1200 liquidated damages to the landlord on April 10, 2017 when he realized they had to breach the lease. The landlord claimed loss of rental income for a period after the tenants moved out of the rental unit as well as the liquidated damages as provided by the tenancy agreement.

I find the tenancy agreement is a contract drawn by the landlord. If the tenants wished to rent from the landlord they were obliged to accept the terms of the agreement without modification. A further example of the contract favouring the landlord is in the last clause of the agreement where the landlord provides the tenants must move out if she gives them one month's notice that she is returning from the other country; no such flexible clause is inserted for the tenants' benefit. The liquidated damage clause must therefore be interpreted having regard to the *Contra Proferentem* doctrine: simply put, this means that any ambiguity in the clause in question must be resolved in the manner most favourable to the tenants.

Although the landlord states in this clause that the payment of liquidated damages will not preclude the landlord from pursuing another remedy available in law, including loss of rental income, this provision ignores the fact that payment of the liquidated damage amount is triggered by the landlord's election to treat the agreement as being at an end, as opposed to its election to affirm the contract and the tenants' obligation to pay rent thereunder despite the tenants' breach of the agreement. The liquidated damage clause requires the landlord to make a choice; if the landlord chooses to claim the liquidated damage amount it must elect to treat the contract as being at an end. This choice is incompatible with a claim for future loss of rent because the tenants' obligation to pay rent is dependent upon the landlord's affirmation of the contract. In order to hold the tenant accountable for future rent, subject only to the landlord's obligation to mitigate its loss, the landlord must in essence say to the tenants: "I expect you to continue to abide by your agreement to pay rent until the end of the term." I find that the landlord may not end the agreement on the one hand and at the same time demand that the tenants abide by the agreement. Having ended the agreement, there is no longer a remedy available in law or in equity for the payment of future loss of rental income.

I find in this case, the tenants interpreted the payment of the liquidated damages as the landlord's acceptance of the end of the tenancy. They were concerned that the landlord understood this and a number of emails were exchanged. On April 26, 2017, the landlord said they wanted to keep the security deposit as an administrative fee if no tenants were found by April 25, 2017. The landlord concluded: "Therefore there is no responsibility for rent from May to October". I find the tenants' interpretation of the

clause is reasonable that their tenancy was ended by paying the liquidated damages fee. I find the landlord not entitled to recover the rental loss after she accepted the end of the tenancy by accepting liquidated damages and confirming by email. I note she did say in an email, she was retaining the security deposit for 'administrative costs". I find this is illegal as she did not file her Application within the 15 days allowed by the Act to claim the security deposit.

Furthermore, as section 7 of the Act states, the landlord has the obligation to do whatever is reasonable to minimize her loss. I find insufficient evidence that the landlord tried diligently to minimize her loss. Although she was in another country, her evidence in the hearing was that she hired no agent to re-rent the property but maintained it was the tenant's responsibility to get another tenant and they should have hired an agent. I find the tenant paid the landlord \$1200 liquidated damages which were noted in the tenancy agreement to cover administrative costs yet I find insufficient evidence that she incurred administrative costs. Although she said rentals are slow in the university area in the summer, I find the tenants showed the suite and provided her with contact information for two prospects and she sent an email to them with her contact number in another country. She also told them that she could only rent to them for 4 months (as she was returning herself in October). I find this is insufficient evidence of diligent efforts to minimize the loss

On the tenant's application, the onus is on them to prove on the balance of probabilities that twice the security deposit should be refunded in accordance with section 38 of the Act. I find the tenant vacated in April 2018 after giving one month's notice and paying rent for May 2018. I find they provided their forwarding address in writing to the landlord on June 22, 2018 and gave no consent to retain their security deposit.

Section 38 of the Act provides that within the later of the end of the tenancy and the provision of the forwarding address in writing, a landlord must either return the deposit or make an application to claim against it. I find the landlord has not refunded the tenant's security deposit and they filed their application on February 26, 2018 which is well beyond the 15 day limitation set out in section 38 of the Act. I find the tenants entitled to recover double their security deposit pursuant to section 38(6) of the Act.

Furthermore, as the landlord elected to treat the tenancy as at an end by accepting payment of liquidated damages, I find they were not entitled to retain the rent for June 2018. I find the tenant entitled to recover \$1350 for the cheque the landlord cashed for June 2018.

Conclusion:

I dismiss the application of the landlord in its entirety without leave to reapply and I find she is not entitled to recover filing fees for her applications. I find the tenant entitled to a monetary order as calculated below and to recover the filing fee for their application.

Calculation of Monetary Award:

Return of June rent	1350.00
Security deposit	675.00
Return of double security deposit	675.00
Fob deposit return	75.00
Filing fee	100.00
Total Monetary Order to Tenant	2875.00

As this Decision confirms the result of the original Decision, **I HEREBY CONFIRM THE DECISION AND ORDER MADE ON JUNE 4, 2018.**

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: September 11, 2018

Residential Tenancy Branch