



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PEMBERTON HOLMES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes: FFL MNDCL-S MNRL-S

Introduction

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

- a monetary order for unpaid rent, pursuant to section 67;
- a monetary order for money owed or compensation monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

MW ("landlord") appeared and testified on behalf of the landlord in this hearing. 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.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing and evidence. In accordance with section 89 of the *Act*, I find that the tenants were duly served with the landlord's application. All parties confirmed receipt of each other's evidentiary materials, and that they were ready to proceed.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation for unpaid rent and losses?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

This fixed-term tenancy began on March 1, 2017, and was to end on February 28, 2018. Monthly rent was set at \$1,995.00 and the landlord collected a security deposit of

\$997.50, which the landlord still holds. The tenants testified that they moved out on January 15, 2018, while the landlord's agent testified that this tenancy ended on January 16, 2018. Both parties confirmed in the hearing that on December 15, 2017 the tenants gave notice that they planned to vacate the rental unit as of January 15, 2018.

The landlords are requesting monetary compensation as follows:

Unpaid Rent for January 2018	\$1,995.00
Unpaid Water Bill	227.24
Carpet Cleaning	156.45
Liquidated Damages	500.00
Invoice for Repairs	621.22
Total Monetary Award Requested	\$3,499.91

The tenants do not dispute that they owe unpaid rent for January 2018 in the amount of \$1995.00.

The tenants also do not dispute that they had withheld the \$227.24 payment for the water bill for this tenancy. The tenants testified that they are disputing this outstanding bill as there was a leak, and they should be responsible for only paying a portion of this water bill. The tenants testified that the dishwasher and refrigerator were not functioning properly, and leaked.

The landlord is claiming \$156.45 and \$621.22 and as the tenants did not leave the unit in reasonably clean and undamaged condition. The landlord testified that the tenants did not professionally clean the carpets, nor did they submit any receipts to prove that they had done so. The landlord also submitted an invoice in the amount of \$621.22 for maintenance required for the window sill, window frames, and caulking. The landlord believes that the tenants had damaged the unit due to the excessive moisture from the tenants' plants. The landlord testified that they had requested that the tenants remove the 115 plants they had inside the unit, but the tenants refused to do so. The tenants disputed this claim, testifying that they had no issues in previous tenancies despite having the same number of house plants, and that the damage was due to mouldy window sills from the heater not working properly.. The tenants testified that the new tenants have not had an issue yet as the weather has not gotten cool enough for them to experience moisture issues.

The landlord's agent testified that despite the fact that the tenants did not comply with the Act in moving out before the end of this fixed-term tenancy, they mitigated their losses, and were able to re-rent the unit. The landlord is seeking liquidated damages in

the amount of \$500.00 as set out in the tenancy agreement. The landlord submitted a copy of the tenancy agreement which indicates a \$500.00 “liquidated damages” clause. The clause reads: *“If the Tenant breaches a material term of this agreement that causes the landlord to end the tenancy before the end of the fixed term or if the tenant provides the landlord with notice, whether written, oral, or by conduct, of an intention to breach this Agreement and end tenancy by vacating, and does vacate before the end of the fixed term, the tenant will the landlord the sum of \$500.00 as liquidated damages, and not as a penalty for all costs associated with re-renting the rental unit”*

The tenants do not dispute the fact that they moved out before the end of the fixed-term agreement, but that they did so due to the multiple unresolved maintenance issues. The tenants dispute the liquidated damages claim as the landlord did not suffer any actual losses, and therefore the claim should be considered a penalty.

Analysis

When making a claim for damages under a tenancy agreement or the *Act*, the party making the claim has the burden of proving their claim. Proving a claim in damages includes establishing that damage or loss occurred; establishing that the damage or loss was the result of a breach of the tenancy agreement or *Act*; establishing the amount of the loss or damage; and establishing that the party claiming damages took reasonable steps to mitigate their loss

Section 44 of the *Residential Tenancy Act* reads in part as follows:

44 (1) A tenancy ends only if one or more of the following applies:

(a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...

(b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;

(c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

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.

While the tenants did notify the landlord of the early termination of this tenancy, they did not end it in a manner that complies with the *Act*, as stated above. The landlord did not mutually agree to end this tenancy in writing, nor did the tenants obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No applications for dispute resolution have been filed by the tenants in regards to this tenancy. The tenants moved out earlier than the date specified in the tenancy agreement, and the effective date was not the day before the day the rent is payable under the tenancy agreement.

The evidence is clear that the tenants did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenants vacated the rental unit contrary to Sections 44 and 45 of the *Act*. I must now consider whether the landlord is entitled to the \$500.00 as set out in the liquidated damages clause.

Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

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...

The landlord drafted the agreement calling for payment of \$500.00 as liquidated damages in the event that the tenants ended the tenancy before the end of the fixed term. This clause in the contract specified that the amount was not a penalty. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. The amount claimed in an agreement as liquidated damages is intended to be an estimate of the loss that may be suffered by the landlord if the tenants breach the agreement by ending the tenancy early. In this case, however, the landlord did not make a monetary claim for loss of rental income as they were able to mitigate their losses by re-renting the rental unit, but applied for a \$500.00 liquidated damage fee to cover the other costs associated with tenants' early termination of the rental unit.

I am satisfied that the landlord is entitled to a monetary award of \$500.00. I do so as I accept the landlord's assertion that this is not a penalty but a legitimate pre-set charge for ending this fixed term tenancy early. I find this to be a reasonable estimate of the landlord's loss in the event of a breach to cover change over costs, such as advertising, interviewing, administration, re-renting of the rental unit due to the early termination of this tenancy.

Section 26 of the Act, in part, states as follows:

Rules about payment and non-payment of rent

- 26** (1) *A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.*

I find that the tenants were obligated to pay the rent and water bill, as per the tenancy agreement and the *Act*. I find the landlord provided undisputed evidence to support that the tenants have not paid the outstanding rent and water bill for this tenancy, nor did they have an order from an Arbitrator allowing them to deduct all or a portion of the rent or water bill, nor do I find that the tenants had a right under the *Act* to deduct or withhold all or portion of the rent or water bill. Accordingly I find that the landlord is entitled to \$1,995.00 in unpaid rent, and \$227.24 for the water bill.

Section 37(2)(a) of the *Act* stipulates that when a tenant vacates a rental unit the tenant must leave the rental unit reasonably clean, and undamaged condition except for reasonable wear and tear. I have reviewed the landlord's monetary claim for damages, and have taken in consideration of the evidential materials submitted by the landlord, as well as the sworn testimony of both parties.

Despite the fact that there was damage to the rental unit, I find that the tenants disputed the landlord's claim that they had contributed to the excessive moisture which caused the damage to the rental unit. In light of the conflicting evidence provided, and taking in consideration that the party claiming the loss bears the burden of proof, I find that the landlord has not provided sufficient evidence to support that the tenants were solely responsible for the damage to the window sill, frames, and caulking. On this basis, I dismiss the landlord's monetary claim for damage to the window sill, frames, and caulking without leave to reapply.

I find that the landlord provided sufficient evidentiary evidence to support that the tenants failed to leave the carpet in reasonably clean condition, and accordingly I allow the landlord a monetary claim of \$156.45 for carpet cleaning.

The filing fee is a discretionary award issued by an Arbitrator usually after a hearing is held and the applicant is successful on the merits of the application. As the landlord was only partially successful in their application, I find that the landlord is entitled to recover half of the \$100.00 filing fee paid for this application.

The landlord continues to hold the tenants' security deposit of \$997.50. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain \$997.50 of the tenants' security deposit in satisfaction of the monetary claim.

Conclusion

I issue a Monetary Order in the amount of \$1,931.19 in the landlord's favour as set out in the table below. I allow the landlord to retain the tenants' security deposit in satisfaction of their monetary claim. The landlord's monetary claim for damage to the window sill, frames, and caulking is dismissed without leave to reapply.

Unpaid Rent for January 2018	\$1,995.00
Unpaid Water Bill	227.24
Carpet Cleaning	156.45
Liquidated Damages	500.00
Recovery of Half of the Filing Fee	50.00
Less Security Deposit	-997.50
Total Monetary Award	\$1,931.19

The landlord is provided with this Order in the above terms and the tenant(s) must be served with a copy of this Order as soon as possible. Should the tenant(s) 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: October 9, 2018

Residential Tenancy Branch