



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes 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 sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67; and
- authorization to recover the filing fee from the tenants, pursuant to section 72.

The tenants did not attend this hearing, although I left the teleconference hearing connection open until 1:41 p.m. in order to enable the tenants to call into this teleconference hearing scheduled for 1:30 p.m. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

The landlord testified that the tenants were individually served the notice of dispute resolution packages by registered mail on August 27, 2018. The Canada Post receipts and tracking numbers were entered into evidence. I find that the tenants were deemed served with these packages on September 1, 2018, five days after their mailing, in accordance with sections 89 and 90 of the *Act*.

Issue(s) to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to recover the filing fee from the tenants, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of the landlord, not all details of his submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The landlord provided undisputed testimony that this two-year fixed term tenancy began on July 15, 2017 and ended on July 31, 2018. The fixed term tenancy was originally set to end on July 15, 2019. Monthly rent in the amount of \$3,500.00 was payable on the first day of each month. A security deposit of \$1,750.00 was paid by the tenants to the landlord. A pet damage deposit of \$1,750.00 was paid by the tenants to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application.

The landlord testified that on July 31, 2018 the tenants e-mailed him and told him that they found mould in the subject rental property and would be vacating the subject rental property. The e-mail exchange between the landlord and the tenant from July 31, 2018 to August 22, 2018 was entered into evidence. The landlord testified that he did not know on what date the tenants vacated the subject rental property. An e-mail from the tenant to the landlord dated August 14, 2018 states that the tenants had, by that date, removed all of their possessions from the subject rental property and that the tenants had tried to return the keys to the landlord's agent on August 14, 2018 but that the office was closed. The landlord filed for dispute resolution on August 20, 2018.

The landlord testified that prior to the July 31, 2018 e-mail from the tenants, the tenants had never complained of a mould problem and the landlord was not aware that one existed.

The landlord testified that the tenants provided their forwarding address to the property manager via e-mail but that he did not know on what date.

The landlord testified that his property management company immediately started to seek a new tenant for the subject rental property once the tenants informed the landlord of their intention to move. The landlord entered into evidence a tenancy agreement signed by new tenants on August 22, 2018 for a tenancy starting on September 1, 2018. The landlord is seeking to recover August 2018's rent in the amount of \$3,500.00 from the tenants.

The landlord is also seeking to recover a "tenant placement fee" in the amount of \$1,837.50 that the landlord's property management company charged him to find a new tenant. A receipt showing same was entered into evidence. The landlord did not provide any evidence as to how that fee was calculated.

Section 7 of the tenancy agreement states:

If the tenant ends the fixed term tenancy before the end of the original term as set out in clause 6 above, the landlord may treat this Agreement as being at an end. In such event, the tenant will pay the sum of \$400.00 plus HST to the landlord as liquidated damages, and not as a penalty. Liquidated damages cover the landlord's agent's cost of re-renting the rental unit and must be paid in addition to any other amount owed by the tenant, such as unpaid rent or for damage to the rental unit or residential property.

Analysis

Section 45 of the *Act* states that if a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

I find that prior to the tenants' July 31, 2018 e-mail, the tenants did not put the landlord on notice that there was mould in the subject rental property and that they considered its presence a breach of a material term. I find that since the tenants did not provide the landlord with time to correct the situation, the tenants are not entitled to break their fixed term tenancy, pursuant to section 45(3) of the *Act*.

Section 45(2) of the *Act* states that 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 in failing to provide the landlord with notice to end a tenancy in accordance with section 45(2) of the *Act*, the tenants breached section 45(2) of the *Act*.

Under section 7 of the *Act* a landlord or tenant who does not comply with the *Act*, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

In this case, the tenant ended a two-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement. Pursuant to section 7, the tenants are required to compensate the landlord for that loss of rental income. The landlord testified that his property management company promptly advertised the subject rental property for rent after the tenant informed the landlord that they were vacating the subject rental property. Subsequently, the unit was rented out for September 1, 2018. I find that the landlord mitigated his damages by promptly having the subject rental property advertised for rent. The tenants, pursuant to section 7 and Policy Guideline 16, are therefore liable for August 2018's rent in the amount of \$3,500.00

Liquidated Damages

Policy Guideline #4 states that 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.

In this case, I find that the liquidated damages clause was clearly and carefully laid out in the tenancy agreement and detailed the consequences of breaking the fixed term tenancy agreement to the parties.

I find that the amount of \$400.00 plus HST stipulated to cover the administration costs that the landlord would have likely incurred at the time the tenancy agreement was entered into is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy. The landlord did not enter into evidence any information regarding the HST rate.

Since both parties agreed to a liquidated damage fee of \$400.00 in the event that the fixed term tenancy agreement was terminated early by the tenant, I find that the landlord is not entitled to receive a higher amount. The landlord is claiming \$1,837.50 which he was charged by his property management company to find a new tenant. It was the landlord's choice to hire a property management company that charges a higher amount for costs associated with finding a new tenant, than the landlord is entitled to recover via the liquidated damages clause in the tenancy agreement.

I find that the tenants are liable to pay liquidated damages in the amount of \$400.00. As the landlord did not provide evidence as to the HST rate at the time the tenancy was entered into, I decline to award any amount for HST.

Security Deposit

Section 38 of the *Act* states that within 15 days after the later of:

- (a) the date the tenancy ends, and
- (b) the date the landlord receives the tenant's forwarding address in writing, the landlord must do one of the following:
 - (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
 - (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that this tenancy ended on August 14, 2018, when the tenants notified the landlord via email that all their belongings had been removed from the subject rental property.

I find that the landlord made an application for dispute resolution claiming against the security and pet damage deposits pursuant to section 38 of the *Act*.

Section 72(2) states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenants' entire security and pet damage deposits in the amount of \$3,500.00 in part satisfaction of his monetary claim against the tenants.

As the landlord was successful in his application, I find that he is entitled to recover the \$100.00 filing fee from the tenants, pursuant to section 72 of the *Act*.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
August rent	\$3,500.00
Liquidated damages	\$400.00
Filing Fee	\$100.00
Less deposits	-\$3,500.00
TOTAL	\$500.00

The landlord is provided with this Order in the above terms and the tenants must be served with this Order as soon as possible. Should the tenants 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: December 18, 2018

Residential Tenancy Branch