



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S, MNDL-S

Introduction

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

- a monetary for money owed or compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement, pursuant to section 67;
- authorization to retain the tenant's security deposit in partial satisfaction of the monetary order requested, pursuant to section 38; and
- authorization to recover the filing fee for its application from the tenant, pursuant to section 72.

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 parties acknowledged receipt of evidence submitted by the other. I have reviewed all evidence and testimony before me that met the requirements of the rules of procedure; however, I refer to only the relevant facts and issues in this decision.

Issue to be Decided

Is the landlord entitled to a monetary award for loss and damages arising out of this tenancy?

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

Background, Evidence

The landlord's testimony is as follows. The one year fixed term tenancy began on November 1, 2017 but ended earlier on August 1, 2018. The tenants were obligated to

pay \$3800.00 per month in rent in advance and at the outset of the tenancy the tenants paid a \$1900.00 security deposit which the landlord still holds. The landlord testified that as per the liquidated damages clause on their addendum to their tenancy agreement, the tenants are responsible for the equivalent of two months' rent if they end the tenancy early. The landlord testified that the tenants emailed him on May 3, 2018 advising that they would be moving out on August 1, 2018. The landlord also seeks \$4165.00 for fire damage to the patio that he alleges the tenants caused. The landlord testified that the tenants should have had insurance so that it could have covered the costs to repair the fire damage.

The landlord is applying for the following:

1.	Liquidated Damages	\$7600.00
2.	Fire Damage	4165.00
3.	Filing Fee	100.00
4.		
5.		
6.		
	Total	\$11865.00

The tenant gave the following testimony. The tenant testified that they gave almost three full months' notice to move out and were never advised that the landlord would be seeking compensation. The tenant testified that they were very accommodating and helpful in allowing access so that the landlord could re-rent the unit. The tenant testified that the liquidated damages amount is unconscionable and unfair under the circumstances. The tenant testified that they were not home when the fire on the patio occurred. The tenant testified that they have always had renters insurance but do not feel that their insurance should cover something that they are not responsible for.

Analysis

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 arguments are reproduced here. The principal aspects of the landlord's claim and my findings around each are set out below.

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 provide **sufficient evidence of the following four factors**; the existence of the damage/loss, that it stemmed directly from a violation of the agreement or a contravention of the Act on the part of the other party, the applicant must also show that they followed section 7(2) of the Act by taking steps to mitigate or minimize the loss or damage being claimed, and that if that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

Liquidated Damages - \$7600.00

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.

When a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord may incur costs of re-renting earlier than it would have without the breach. This may expose the landlord to extra costs of re-rental. However, when the sum of the liquidated damages is a high amount, it can be viewed as a penalty rather than the actual cost of re-rental. The landlord did not provide testimony to re-renting costs such as; a leasing agent, posting advertisements online, showing the rental unit, extra cleaning or repairs and appliance checks by a maintenance person, the landlord has not provided sufficient evidence to show his costs are equal to two month's rent of \$7600.00. The landlord has not met its burden to show that the liquidated damages are intended to cover the cost of re-rental.

The landlord also failed to provide sufficient evidence to demonstrate how an amount equal to two month's rent was selected as a reasonable pre-estimate for the cost of re-rental at the time of the signing of the tenancy agreement. Therefore, I find that the landlord is attempting to impose a penalty upon the tenant by charging liquidated damages of \$7600.00 for breach of the fixed term lease. I find that the liquidated damages clause in the tenancy agreement is unenforceable. Accordingly, the landlord's claim for liquidated damages in the amount of \$7600.00 is dismissed without leave to reapply.

Fire Damage - \$4165.00

As noted above, the landlord must satisfy all four factors of a proof of loss to be granted a monetary award under section 67 of the Act. The landlord was unable to provide sufficient evidence to satisfy me that the tenants caused the damage through negligence or recklessness or if they in fact caused it, accordingly; I must dismiss this portion of the landlords' application.

The landlord has not been successful in their application.

Conclusion

The landlords' application is dismissed in its entirety without leave to reapply. The landlord is to return the \$1900.00 security deposit to the tenants. I grant the tenants an order under section 67 for the balance due of \$1900.00. This order may be filed in the Small Claims 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: January 08, 2019

Residential Tenancy Branch