



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding Taryn Court Apartments Ltd. and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL –S, FFL

Introduction

This proceeding dealt with the landlord's application for monetary compensation for damages or loss under the Act, regulations or tenancy agreement; and, authorization to make deductions from the tenant's security deposit. The landlord appeared at the hearing; however, there was no appearance on part of the tenant despite leaving the teleconference call open at least 20 minutes to provide the tenant the opportunity to appear.

Since the tenant did not appear for the hearing, I explored service of hearing documents. The landlord testified that the landlord's hearing package was sent to the tenant at the tenant's forwarding address on September 11, 2018 and successfully delivered on September 14, 2018. The landlord provided a copy of the registered mail receipt, including tracking number, and the condition inspection report that contains the tenant's forwarding address, as proof of service. The landlord testified that the landlord's supporting documents and evidence was sent to the tenant via registered mail on December 11, 2018 and successfully delivered on December 15, 2018. The landlord orally provided the registered mail tracking number as proof of service. I was satisfied the tenant was duly served with the hearing documents and evidence and continued to hear from the landlord without the tenant present.

I note that the hearing was originally scheduled for January 8, 2019 at 1:30 p.m. On December 18, 2018 a staff person with the Residential Tenancy Branch notified the parties that the hearing had to be rescheduled to January 31, 2019. A Notice of Hearing was emailed to both parties.

I also note that evidence was submitted by or on behalf of the tenant on January 21, 2019. The landlord confirmed that she received a message from or on behalf of the tenant indicating evidence was left for the landlord on January 21, 2019. The landlord found a package leaning on the outside of the building. The landlord opened the package and found that it contained copies of previous dispute resolution although the landlord was uncertain as to its relevance since it was not accompanied by any written submissions.

Since the tenant submitted evidence on January 21, 2019, I am satisfied the tenant was notified that the hearing had been rescheduled. As for consideration of the tenant's materials, I find that

it was not properly served upon the landlord. Furthermore, Rule 7.4 of the Rules of Procedure provides:

7.4 Evidence must be presented

Evidence must be presented by the party who submitted it, or by the party's agent. If a party or their agent does not attend the hearing to present evidence, any written submissions supplied may or may not be considered.

The tenant, or her representative, submitted a number of previous dispute resolution proceedings apparently obtained from the Residential Tenancy Branch website and a decision issued by the Nova Scotia Supreme Court. These materials were not accompanied by any written submissions or arguments and there was no attendance by the tenant or her representative during the hearing. Therefore, I did not consider the tenant's materials any further.

Issue(s) to be Decided

1. Has the landlord established an entitlement to compensation for damage to the toilet seat and liquidated damages?
2. Is the landlord authorized to make deductions from the security deposit?

Background and Evidence

The fixed term tenancy started on December 1, 2017 and was set to expire on November 30, 2018. The tenant paid a security deposit of \$625.00 and was required to pay rent of \$1,250.00 on the first day of every month. The tenancy agreement provides the following clause:

5. **LIQUIDATED DAMAGES.** If the tenant breaches a material term of this Agreement that causes the landlord to end the tenancy before the end of any 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 the tenancy by vacating, and does vacate before the end of any fixed term, the tenant will pay to the landlord the sum of ~~\$600.00~~ as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.

On July 31, 2018 the tenant provided the landlord with a written document giving her notice of intent to vacate the rental unit and end the tenancy as of August 31, 2018. The landlord responded on the same date, by letter, advising the tenant that she would be breaking the fixed term tenancy agreement and would have to pay liquidated damages of \$600.00 and any loss of rent for the remainder of the fixed term. The tenant proceeded to end the tenancy early and vacated the unit on August 31, 2018.

The landlord and tenant participated in the move-out inspection and an inspection report was completed. The tenant indicated she agreed with the landlord's assessment of the condition of

the rental unit. The tenant did not authorize the landlord to retain any portion of her security deposit for liquidated damages or a replacement toilet seat.

The landlord submitted that the landlord was successful in re-renting the unit and did not suffer a loss of rent; however, the landlord seeks compensation for liquidated damages. Although the tenancy agreement provides that the tenant would have to pay \$600.00 for liquidated damages, the landlord has limited its claim for liquidated damages to \$450.00.

The landlord submitted that in determining the amount payable for liquidated damages that appears in the tenancy agreement (\$600.00), the landlord used its past experience that, on average, 2 to 3 days is spent by a property manager to re-rent a unit. In this case, the landlord received communication from the tenant, or her lawyer, indicating the tenant did not agree to pay the liquidated damages so the landlord kept a log of time spent advertising the unit, fielding enquiries from potential tenants, giving the tenant notice of an upcoming showing(s) to a prospective tenant, showing the unit to prospective tenants, reviewing tenancy applications, and performing reference checks. In this particular case, the landlord spent 18 hours of time to re-rent the unit and in applying an hourly rate of \$25.00 per hour, determined the landlord incurred \$450.00 in costs to re-rent the unit. The landlord was of the position that \$25.00 per hour is estimated based on an average salary of a property manager which is between \$50,000 to \$60,000 per year.

In addition to liquidated damages, the landlord requested \$37.86 to replace the toilet seat that was broken at the end of the tenancy. The landlord spent \$12.86 to purchase a new seat and requests \$25.00 in labour to purchase and install the new seat.

Documentary evidence provided by the landlord included: the tenancy agreement; written communication between the landlord and tenant; written communication between the landlord and the tenant's lawyer; proof of listing the unit for rent; a log of the time the landlord spent trying to re-rent the unit; the condition inspection report; a photograph of a broken toilet seat; and, a receipt for the purchase of a toilet seat.

Analysis

Upon consideration of the evidence before me, I provide the following findings and reasons with respect to the landlord's claims against the tenant.

Liquidated damages

Residential Tenancy Branch Policy Guideline 4: *Liquidated damages* provides, in part:

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of liquidated damages.

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.

Upon review of the liquidated damages clause in the tenancy agreement, I note that it specifically indicates that the amount of \$600.00 is not a penalty and indicates it is intended to cover the costs of re-renting the unit in the event the tenant terminates the tenancy before the end of the fixed term.

The tenant in this case ended the tenancy early, before the expiry of the fixed term, and the landlord put the tenant on notice that liquidated damages would apply. The tenant still chose to end the tenancy early. As such, I find the liquidated damages clause was before the tenant for consideration on at least two occasions: when she entered into the tenancy agreement and when the landlord responded in writing to the tenant's notice of intent to end the tenancy.

As for the amount stipulated in the liquidated damages clause, I do not find it to be excessive or unreasonable. The amount is less than one-half of the monthly rent and the landlord provided a reasonable explanation that the amount was determined by taking into account the landlord's past experience in re-renting units.

I further find the landlord's application of \$25.00 per hour for time spent on re-renting a unit is very fair. I consider the task of choosing tenants to be exceptionally important to a landlord and I would not expect such an important role would not be assigned to a low paying position.

In light of the above, I find I am more than satisfied that the liquidated damages clause is intended to offset costs associated with procuring a new tenant and is not unreasonable or indicative of a penalty. Therefore, I find the tenant liable to pay liquidated damages to the landlord that, in this case, the landlord limited to \$450.00 even though the landlord may have requested \$600.00 and I would have awarded that amount.

Toilet seat

The landlord submitted that the toilet seat was broken at the end of the tenancy and seeks to recover the cost of a toilet seat, in the amount of \$12.86, plus \$25.00 in labour to purchase and install the new seat. The landlord provided sufficient evidence that the toilet seat was broken and provided sufficient evidence of the cost to purchase and install a replacement toilet seat. Therefore, I grant the landlord's request to recover \$37.86 from the tenant.

Filing fee

The landlord was successful in its claims against the tenant and I award the landlord recovery of the \$100.00 filing fee.

Security deposit

The landlord is holding a security deposit of \$625.00 and I authorize the landlord to deduct the amounts awarded to the landlord with this decision from the security deposit. I order the landlord to return the balance of the deposit to the tenant which I calculate to be:

Security deposit		\$625.00
Less authorized deductions for:		
Liquidated damages	\$450.00	
Toilet seat	37.86	
Filing fee	<u>100.00</u>	<u>(587.86)</u>
Balance due to tenant		\$ 37.14

In keeping with Residential Tenancy Policy guideline 17, I provide the tenant with a Monetary Order in the amount of \$37.14 to ensure the landlord refunds the balance of the security deposit, as ordered.

Conclusion

The landlord has been awarded compensation totalling \$587.86 and is authorized to deduct this sum from the tenant's security deposit. The landlord has been ordered to return the balance of \$37.14 to the tenant and a Monetary Order in this amount is provided to the tenant with this decision.

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: February 14, 2019

Residential Tenancy Branch