



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## DECISION

Dispute Codes      **MNSD (TENANT); FFL MNDCL-S MNRL-S (LANDLORD)**

### Introduction

This hearing dealt with an application by the tenant under the *Residential Tenancy Act* (the *Act*) for the following:

- An order for the landlord to return the security deposit pursuant to section 38.

This hearing also dealt with an application by the landlord under the *Residential Tenancy Act* (the *Act*) for the following:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*; and
- Authorization to recover the filing fee for this application pursuant to section 72.

The hearing was conducted by teleconference. Both parties attended the hearing and provided affirmed testimony. Each party had the opportunity to make submissions, present documentary evidence, call witnesses and cross examine the other party.

Each party acknowledged receipt of the other party's Notice of Hearing and Application for Dispute Resolution. Neither party raised issues of service. I find each party served the other in accordance with section 89 of the *Act*.

Issue(s) to be Decided

Is the tenant entitled to:

- An order for the landlord to return the security deposit pursuant to section 38.

Is the landlord entitled to:

- A monetary order for unpaid rent and for compensation for damage or loss under the *Act*, *Residential Tenancy Regulation* ("*Regulation*") or tenancy agreement pursuant to section 67 of the *Act*;
- Authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 72 of the *Act*; and
- Authorization to recover the filing fee for this application pursuant to section 72.

Background and Evidence

The parties agreed they entered into a fixed term tenancy agreement on May 1, 2017 for rent of \$1,800.00 payable on the first of the month. The tenant provided a security deposit in the amount of \$900.00 at the beginning of the tenancy which the landlord holds. The tenant has not provided the landlord with permission to retain the security deposit.

The tenancy agreement contained a clause (section 3.1) requiring the tenant to pay liquidated damages in the amount of \$900.00 if she ended the tenancy early. The landlord submitted a copy of the tenancy agreement as evidence.

The parties agreed the tenant provided written notice to the landlord on October 23, 2018 stating that she was vacating the unit on November 30, 2018 before the end of the fixed term tenancy agreement.

The parties conducted a condition inspection at the end of the tenancy that indicated the unit was clean and undamaged.

The landlord testified that an agreement with a replacement tenant was signed on November 22, 2018 for a tenancy set to begin on December 15, 2018 for \$1,800.00. The unit was not occupied for the first two weeks of December 2018.

The landlord filed an application to retain the security deposit within 15 days of the end of the tenancy.

The landlord claimed the following:

ITEM	AMOUNT
Rent (December 1 – 15, 2018)	\$900.00
Liquidated damages	\$900.00
<b>Total Monetary Order Claimed by Landlord</b>	<b>\$1,800.00</b>

In support of the landlord's claim for rent for the first half of December 2018, the landlord explained the unit was vacant after the tenant vacated on November 30, 2018 until December 15, 2018 despite the landlord's efforts to rent the unit beginning December 1, 2018.

The landlord testified that on October 23, 2018, the day the tenant provided notice of intention to vacate, the landlord posted advertisements for the unit on two online websites; copies of the advertisements were submitted as evidence. This was the only evidence of efforts by the landlord to find a replacement occupant for the unit.

The agent representing the landlord at the hearing stated that she was not personally responsible for overseeing the rental of the unit. She testified that the practice of the landlord is for office personnel to refresh the online advertisements every two weeks; she assumed this took place, although she was not personally knowledgeable of these steps having been taken.

The landlord testified she had no personal knowledge of how many prospective tenants called or emailed to ask about the unit, or how many people viewed the unit.

The tenant objected to the landlord's claim for compensation for rent for the first half of December 2018. The tenant testified she provided the landlord with 5 weeks notice of her intention to vacate to allow the landlord ample opportunity to find a replacement tenant.

The tenant testified there was an extremely low vacancy rate at this time in the geographical area in which the unit was located. Despite the fact the unit was well-priced and well situated, the unit was only viewed once in the five weeks before she vacated. The tenant submitted that a reasonable effort by the landlord to find a replacement tenant would have succeeded and a new tenant would have been in the unit on December 1, 2018.

The tenant stated that when she provided her notice, she offered to assist the landlord in any way possible to find a replacement tenant. She testified that the unit was in top condition and that she offered to take high quality photographs to add to the information on the websites. The landlord did not accept the tenant's offer.

The landlord also claimed entitlement to the sum of \$900.00 as liquidated damages based on the term in the contract providing for this amount to be paid by the tenant if she vacated before the end of the fixed term. The landlord submitted no receipts, estimates of costs, or approximations of time spent finding a replacement tenant.

The tenant objected to paying the liquidated damages and said the landlord had done nothing to earn this money.

The landlord claimed reimbursement of the cost of the filing fee of \$100.00.

The tenant claimed return of her security deposit of \$900.00 and reimbursement of the cost of the filing fee of \$100.00.

### Analysis

While I have turned my mind to the documentary evidence and the testimony presented, not all details of the submissions and arguments are reproduced here. The principal aspects of this matter and my findings are set out below.

Section 67 of the *Act* establishes that if damage or loss results from a tenancy agreement or the *Act*, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party.

The purpose of compensation is to put the person who incurred the damage or loss in the same position as if the damage or loss had not occurred. The person claiming compensation must establish **all** the following four points:

1. The existence of the damage or loss;

2. The damage or loss resulted directly from a violation – by the other party – of the *Act*, regulations, or tenancy agreement;
3. The actual monetary amount or value of the damage or loss; and
4. Everything reasonable was done to reduce or minimize (mitigate) the amount of the loss or damage as required under section 7(2) of the *Act*.

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

In this case, the onus is on the landlords to prove they are entitled a claim for a monetary award.

Reference to each of the landlord's and tenant's claims follows.

*Landlord's claim - Rent for December 1-15, 2019*

A tenant may only end a fixed term tenancy agreement in limited and specific circumstances as provided under section 45 (2) and (3) of the *Act*, which are situations, for example, where a tenant is fleeing domestic violence or going into a care home. None of the circumstances in these sections apply to this case.

Section 7 of the *Act* provides that where a landlord claims against a tenant for loss of rent the landlord has a burden to prove the landlord took made every reasonable effort to minimize losses. Section 7 states as follows (emphasis added):

*7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.*

*(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement **must do whatever is reasonable to minimize the damage or loss.***

Considering the evidence in the case, I find on a balance of probabilities that the landlord has not met the burden of establishing that the landlord did "whatever is reasonable to minimize the damage or loss".

I find the tenant provided a five-week notice of her intention to break a fixed term tenancy. I find that in that five-week period, the landlord posted the unit on only two websites. The landlord submitted no evidence of any other efforts. The landlord did not know the number of prospective tenants who enquired about the unit and whether the landlord responded in a timely manner or made any effort to show the unit to interested occupants.

I accept the tenant's uncontradicted evidence that the unit was viewed only once in the five-week period. I accept the tenant's uncontradicted evidence that she offered to assist the landlord to find a suitable replacement tenant by, for example, taking high quality photographs of the unit for advertising and that the landlord did not accept her offer to help. I find the landlord made almost no efforts to find a replacement tenant; I find the landlord did not make sensible, practical or reasonable efforts.

I accordingly dismiss the landlord's claim for reimbursement for rent for the period December 1-15, 2018.

*Landlord's claim - Liquidated Damages*

The landlord claims liquidated damages in the amount of \$900.00. The landlord based the claim on a provision of the tenancy agreement which stated that, if the tenant vacated the unit prior to the end of the term, the tenant is required to pay the landlords liquidated damages in this amount.

The tenant acknowledged that the agreement contained a liquidated damages clause. However, the tenant stated that the landlord did not establish any costs or time in finding another occupant of the unit. The tenant stated that the websites offered free posting.

In reply, the landlord responded that the amount of liquidated damages was a reasonable estimate of the costs of advertising and locating a suitable tenant for the unit if the tenant vacated before the end of the term. The amount was a reasonable estimate at the beginning of the tenancy of the landlord's anticipated expenses; the landlord acknowledged the landlord did not prove any actual proof of expenses at the hearing.

The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed-term tenancy agreement is to attempt to limit the number of times the landlord must incur the costs of re-renting.

I find it more likely than not that, when a tenant breaches a fixed term tenancy agreement resulting in an early end to the tenancy, the landlord incurs the costs of re-renting earlier than it would have without the breach. This exposes the landlord to extra costs of re-rental. For that reason, I find there is a loss to the landlord associated with the tenant's breach.

In this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting a unit after the tenant's breach.

*Residential Tenancy Policy Guideline #4* examines the issue of liquidated damages and notes,

*"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... 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."*

Considering the above *Policy Guideline*, I find the liquidated damages of \$900.00 to be a reasonable and genuine pre-estimate of the loss. While the landlord did not provide time and expenses incurred in this specific case, the landlord testified that the liquidated damages are intended to cover administrative costs of the rental advertisements, of answering enquiries about the unit, and of showing the unit to potential tenants.

Considering the evidence of the parties, the evidence submitted, and the burden of proof required, I find on a balance of probabilities that the landlord has established a claim against the tenant for the liquidated damages as a genuine pre-estimate of the costs of re-rental of the unit.

I therefore find that the landlord is entitled to a monetary award of \$900.00 for liquidated damages.

#### *Tenant's Claim – security deposit*

I find the tenant provided a security deposit to the landlord in the amount of \$900.00, as agreed by the parties.

Using the offsetting provisions contained in section 72 of the *Act*, I allow the landlord to retain the tenant's security deposit in its entirety, in satisfaction of the monetary award.

I find that neither party is entitled to reimbursement of the filing fee as each has been equally successful.

As the amount of the monetary award to the landlord (\$900.00) is offset by the amount of the security deposit owing the tenant (\$900.00), I find that neither party is entitled to a monetary order.

In summary, I award the landlord \$900.00 and authorize the landlord to retain the security deposit of \$900.00 in satisfaction of the award, leaving no balance owing either party by the other.

#### Conclusion

Neither party is awarded a monetary order.

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: April 10, 2019

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Residential Tenancy Branch