



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: FFL MNDCL-S MNRL-S

Introduction

This hearing dealt with the landlords' 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 for 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.

TG ('landlords') appeared and testified on behalf of the landlords in this hearing. OK, tenant, appeared on behalf of the tenants. 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 landlords' application for dispute resolution hearing and evidence. In accordance with sections 88 and 89 of the *Act*, I find that the tenants were duly served with the landlords' application and evidence. The tenants did not submit any written evidence for this hearing.

Issue(s) to be Decided

Are the landlords entitled to monetary compensation for unpaid rent and losses?

Are the landlords entitled to recover the filing fee for this application from the tenants?

Background and Evidence

This fixed-term tenancy began on September 5, 2018, and was to end on July 31, 2019. Monthly rent was set at \$3,075.00, payable on the first of the month. The landlords had collected, and still hold, a security and pet damage deposit in the amount of \$1,537.50 each deposit. The tenants moved out on January 20, 2019.

The landlords are requesting monetary compensation as follows:

January 2019 Rent	\$3,075.00
February 2019 Rent	3,075.00
Half Month Rent Penalty for Breaking Lease Without Permission	1,537.50
Administration Fee	200.00
Utility Bill	500.00
Filing Fee for Previous Hearing	100.00
Filing Fee for this application	100.00
Registered Mail Cost for Previous Hearing	39.75
Registered Mail for this application	50.00
Total Monetary Award Requested	\$8,677.25

The tenants do not dispute the landlords' claim for January 2019 rent, or for the unpaid utilities. The landlords' agent confirmed in the hearing the actual outstanding amount the tenants owe for the unpaid utilities, which was \$331.97, rather than the \$500.00 indicated above.

It was undisputed by the tenants that they had moved out before the end of this fixed-term tenancy. The tenants testified that they had to end this tenancy early, as one of the tenants suffered from a rare, auto-immune disease, and had drunk water during the period when the city had issued a special water advisory. The tenants testified that the landlords had failed to inform them of the water issue or advisory. The tenants testified that there was a verbal agreement between both parties that they could move out early. The tenants also dispute the above claims for losses as the landlords had sold the home shortly after the tenants had moved out, and did not support the losses claimed.

The landlords do not dispute that the home was sold. The landlords' testimony is that the tenants had only given official, written notice on January 5, 2019, and moved out on January 20, 2019. The landlords had listed the home, but testified that they were unable to show the home until the tenants had moved out. The landlords' agent had attempted to rent out the property at a reduced monthly rent for February 1, 2019, but was unable to do so. On February 6, 2019 the landlords listed the home for sale, and on February 8, 2019 the agent was informed to take down the rental listing. The agent's testimony is that he had two prospective tenants for April 1, 2019 before he was told to take down the listing. The home was sold with a condition-free offer and completion date of March 20, 2019.

The landlords are requesting a monetary order for the lost rental income for February 2019, as well as the costs of filing this application, and the previous one. The landlords had previously filed another application, which the Arbitrator dismissed with leave to reapply on February 28, 2019.

The landlords are also seeking a \$200.00 administrative fee as well as a placement fee of \$1,537.50 as set out in the tenancy agreement. The landlords submitted a copy of the tenancy agreement which includes a clause for ending a tenancy. The clause reads: *“Should the tenancy agreement be terminated for any reason prior to the agreed length of stay...an administration fee of \$200.00 will automatically apply. The tenant may be liable to pay...for a pro-rated amount of rent and any additional costs to re-rent the property.(early termination of a lease will require the tenant to pay a “placement fee” to find a new tenant, which is equivalent to ½ a month’s rent.)”*

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.

As the tenants are not disputing the January 2019 rent and outstanding utilities, I allow the landlords’ claim for these portions of their application.

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 landlords of the early termination of this tenancy, they did not end it in a manner that complies with the *Act*, as stated above. Although the tenants' testimony is that there was a verbal agreement, the landlords 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 on a date that was earlier than one month after the date the landlords had received the official, written notice.

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 landlords are entitled to the loss of rental income for February 2019, a \$200.00 Administration Fee, as well as the placement fee as set out in the tenancy agreement.

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 landlords had drafted the agreement calling for payment of no less than the equivalent of half of the month's rent in the case of an early termination, in addition to a \$200.00 set Administration Fee. The landlords had referenced the placement fee as a "penalty" in their monetary worksheet. 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 tenant breaches the agreement by ending the tenancy early. In this case, the landlord is requesting an administration fee in addition to the placement fee. The clause in the tenancy agreement states that the placement fee is to cover the cost of finding a new tenant, which is pre-determined to be half a month's rent.

The amount claimed for liquidated damages, as set out in the RTB Policy Guideline above, must be a legitimate 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. Although the landlord referenced this amount as a "penalty" on the monetary worksheet, I note that the tenancy agreement states that this placement fee is to cover the cost of finding a new tenant. I find that the evidence presented supports that the landlord did sell the property instead of re-renting it, but not until after the landlord's agent had made an effort to re-rent the property. I find the landlord's evidence supports the fact that the landlords' agent had in fact attempted to find a new tenant. I, therefore, find the placement fee to be a genuine pre-estimate of the cost of re-renting the property. Accordingly, I allow the landlords the claim for the placement fee in the amount of \$1,537.50.

I deny the landlords' claim for the \$200.00 Administration Fee as I find this amount constitutes a penalty. The \$1,537.50 placement fee included in the residential tenancy agreement was intended to be a genuine pre-estimate of the landlords' losses in the

event that the tenant breached the agreement by ending the tenancy early. I find that the landlords' claim over and above that estimated loss constitutes a penalty. I find that the placement fee claimed by the landlords was intended to cover the costs associated with the early termination of this tenancy. I find the automatic application of an additional lump sum of \$200.00 to be excessive and unreasonable considering the fact that the landlords had already requested, and been granted a monetary order to cover the costs associated with finding a new tenant in the case of an early termination of the tenancy. For these reasons, I consider the Administration Fee constitutes a penalty, and dismiss this portion of the landlords' claim without leave to reapply.

I have also considered the landlords' application for the loss of rental income for February 2019. Although I acknowledge that the landlords' agent did in fact list the property as soon as possible in order to mitigate the tenants' exposure to the landlord's losses, I find that the landlords had failed to provide sufficient evidence to support the loss claimed by the landlords. I find that it was undisputed that the landlords were successful in selling the property after listing the property for sale on February 6, 2019. I find that it was undisputed that the landlords had asked the agent remove the listing on February 8, 2019. Although the completion date was not until March 2019, I find that the landlords had made the decision to list the property for sale in early February 2019, and remove their rental listing a few days later. I find that any loss of rental income for February 2019 cannot be claimed by the landlords as the landlords had made the business decision to sell the property, and therefore failed to provide sufficient evidence to support whether they had truly suffered a loss, and how this loss was directly due to the tenants' failure to comply with the *Act*. On this basis, I dismiss the landlords' claim for loss of rental income for February 2019 without leave to reapply.

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. Accordingly, I find that the landlords are entitled the \$100.00 filing fee paid for this application. As the landlords' previous application was dismissed with leave to reapply by the Arbitrator, the landlords' application for recovery of the filing fee associated with that previous application is dismissed without leave to reapply.

The landlords had also applied to recover the cost of registered mail associated with both applications. As section 72 of the *Act* only allows for recovery of the filing fee, and not the other associated costs of filing an application, I dismiss this portion of the landlords' application without leave to reapply.

The landlords continue to hold the tenants' security and pet damage deposits of \$1,537.50 each deposit. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlords to retain the tenants' deposits in partial satisfaction of the monetary claim.

Conclusion

I issue a Monetary Order in the amount of \$1,969.47 in the landlords' favour as set out in the table below, which allows for the landlords to retain the tenants' security and pet damage deposit in partial satisfaction of their monetary claim.

January 2019 Rent	\$3,075.00
Placement Fee / Liquidated Damages	1,537.50
Utility Bill	331.97
Filing Fee for this application	100.00
Less Deposits Held by Landlord	-3,075.00
Total Monetary Award	\$1,969.47

The landlords are 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.

The remainder of the landlords' monetary claims are dismissed without leave to reapply.

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: July 4, 2019

Residential Tenancy Branch