



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Decision Codes: FFL, MNDL-S

### **Introduction**

The Application for Dispute Resolution filed by the landlord makes the following claims:

- a. A monetary order in the sum of \$500 pursuant to a liquidated damage clause for breaking a fixed term lease
- b. An order to keep the security deposit.
- c. An order to recover the cost of the filing fee

A hearing was conducted by conference call in the presence of both parties. On the basis of the solemnly affirmed evidence presented at that hearing, a decision has been reached. All of the evidence was carefully considered.

Both parties were given a full opportunity to present evidence and make submissions. Neither party requested an adjournment or a Summons to Testify. Prior to concluding the hearing both parties acknowledged they had presented all of the relevant evidence that they wished to present. The parties acknowledged they had received the documents of the other party.

I find that the Application for Dispute Resolution and Notice of Dispute Resolution Hearing was served on the Tenants by mailing, by registered mail to the forwarding address provided by the tenants on March 2, 2019. With respect to each of the applicant's claims I find as follows:

### **Issues to be Decided**

The issues to be decided are as follows:

- a. Whether the landlord is entitled to a monetary order and if so how much?
- b. Whether the landlord is entitled to retain all or a portion of the security deposit/pet deposit?
- c. Whether the landlord is entitled to recover the cost of the filing fee?

### **Background and Evidence:**

The parties entered into a written fixed term tenancy agreement that provided that the tenancy would start on June 1, 2018 and end on July 31, 2019 and become month to month after that. The tenants were permitted to move in a few days early without paying rent. The rental property is new. The tenancy agreement provided that the tenant(s) would pay rent of \$1650 per month payable in advance on the first day of each month. The tenants paid a security deposit of \$825 and a pet damage deposit of \$825 at the start of the tenancy. The tenancy agreement contained a liquidated damage clause provided that if the tenants ended the tenancy before the end of the fixed term the tenants would pay the landlord \$500 as liquidated damages and not as a penalty for all costs associated with re-renting the rental unit.

On January 20, 2018 the tenants gave the landlord written notice they were vacating the rental unit at the end on February 2019 “due to mental health issues and the physical well being on my partner.” The landlord responded advising that they (the tenants) were responsible to pay rent if the rental unit remained unrented during the fixed term and liquidated damages of \$500.

The parties conducted a condition inspection on February 25, 2019 and the tenants vacated the rental unit. The landlord was able to re-rent the rental unit on March 1, 2019 and did not suffer a rental loss. The landlord returned the pet damage deposit to the tenants during the first week of March. The landlord retains the security deposit of \$825.

The tenants gave the following evidence as to their reasons for disputing the landlord’s claim:

- They found it necessary to end the tenancy early on the advice of their doctor. The male tenant suffers from addiction issues and he was not able live in that rental unit because of marijuana smoke coming from the city streets and business below them. The tenant produced a doctor’s note where the doctor recommends that they move. .
- The tenants rely on a letter dated July 20, 2018 setting a number of deficiencies with the rental unit and demanding repairs be done in a time manner.
- The tenants also rely on a letter from the landlord stating that the security deposit and pet damage deposit would be return if the rental unit was left in a satisfactory condition.

The landlord gave the following evidence:

- The rental property is new and these were the first tenants in this rental unit. Any deficiencies that may have been present in July are not relevant to the tenants' decision to leave.
- The landlord does not have any control on customers of businesses in the bottom floor who be using marijuana and they have no legal ability to control this activity.

Policy Guideline 4 Liquidated Damages provides as follows:

“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.

A clause which provides for the automatic forfeiture of the security deposit in the event of a breach will be held to be a penalty clause and not liquidated damages unless it can be shown that it is a genuine pre-estimate of loss.

If a liquidated damages clause is struck down as being a penalty clause, it will still act as an upper limit on the amount that can be claimed for the damages it was intended to cover.

A clause in a tenancy agreement providing for the payment by the tenant of a late payment fee will be a penalty if the amount charged is not in proportion to the costs the landlord would incur as a result of the late payment.”

Analysis:

After carefully considering all of the evidence I determined the landlord is legally entitled to the claim it has made for the following reasons:

- The Residential Tenancy Act provides that a tenant cannot end a fixed term tenancy by giving notice except at the end of the fixed term, the breach of a material term of the tenancy agreement by the landlord or by agreement between the parties.
- The landlord did not agree in writing to end the tenancy.
- I determined the tenants failed to prove the landlord breached a material term of the tenancy agreement. The tenants made the decision to vacate because of the health issues of one of them. However, the landlord did not cause this health issue and has no control of individuals who have caused it. The tenants are still bound by the contracts they entered into.
- The rental unit was newly constructed. I do not accept the submission of the tenants that deficiencies set out in the letter of July 20, 2019 amount to a material breach of the tenancy agreement.
- The rent was \$1650 per month. The liquidated damage set out in the lease is \$500. I determined this clause is not a penalty and amounts to a genuine pre-estimation of the loss that can occur if a tenant breaches a fixed term tenancy agreement.
- I determined the letter given by the landlord stating they would return the security deposit and pet damage deposit if they left the rental unit in satisfactory condition does not amount to a release of the claim the landlord has for the claim for liquidated damages and does not prevent the landlord from bringing this claim.

Monetary Order and Cost of Filing fee

In summary I determined the landlord has established a monetary claim against the tenant(s) in the sum of \$500 plus the \$100 filing fee for a total of \$600.

Security Deposit

I determined the security deposit plus interest totals the sum of \$825. I ordered that the landlord shall retain the sum of \$600 from the security deposit. I further ordered that the landlord pay to the Tenants the balance of the security deposit in the sum of \$225.

It is further Ordered that this sum be paid forthwith. The parties are given a formal Order in the above terms and the Tenants must serve the landlord with a copy of this Order as soon as possible.

Should the respondent fail to comply with this Order, the Order may be filed in the Small Claims division of the Provincial Court and enforced as an Order of that Court.

This tenants allege they have claims against the landlord. They must first file a Tenants' Application for Dispute Resolution before those claims can be considered.

**This decision is final and binding on the parties.**

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: June 14, 2019

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Residential Tenancy Branch