



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding KAHN INVESTMENTS LTD  
and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes:** FFL MNDCL-S MNDL-S

### **Introduction**

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

- a monetary order for money owed or compensation 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.

LK ('landlord') appeared and testified on behalf of the landlord in this hearing. 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 tenant confirmed receipt of the landlord's application for dispute resolution hearing. In accordance with section 89 of the *Act*, I find that the tenant duly served with the landlord's application. The landlord confirmed receipt of the tenant's evidence package for this hearing. In accordance with section 88 of the *Act*, I find the landlord duly served with the tenant's evidence package.

At the beginning of the hearing the landlord indicated that he wished to proceed only with his liquidated damages claim at this time, and withdraw his application for monetary losses with leave to reapply. Accordingly, the landlord's monetary claim for damages was withdrawn. I make no findings on the merits of the matter. Liberty to reapply is not an extension of any applicable limitation period.

The tenant testified in the hearing that they had only received a portion of the landlord's evidence package. The tenant confirmed that she had received the original package containing the tenancy agreement and application. Accordingly, the landlord's evidence package was excluded for this hearing with the exception of the tenancy agreement and original hearing package.

### **Issue(s) to be Decided**

Is the landlord entitled to monetary compensation for money owed or losses?

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

### **Background and Evidence**

This fixed-term tenancy began on March 28, 2018, and was to end on April 30, 2020. Both parties confirmed that monthly rent was set at \$2,000.00, payable on the first of every month. The tenant paid a security deposit in the amount of \$1,000.00, which the landlord still holds. The tenant testified that they had provided a forwarding address on the move-out date, which was July 31, 2019. The landlord applied for dispute resolution on August 7, 2019.

As per the written tenancy agreement, the landlord is seeking a monetary order in the amount of \$500.00 for liquidated damages. The landlord testified that he suffered a greater loss than \$500.00 due to the tenant's failure to end this tenancy in accordance with the Act. The landlord testified that he received notice in June of 2019 that the tenant would be moving out. The landlord testified that he had spent a substantial amount of his time to locate a new suitable tenant, but ended up renting out the unit to an existing tenant who had resided in another one of his rental units. The landlord testified that although he was able to re-rent the home as of September 1, 2019, for the same monthly rent, he still suffered a month of lost rental income, as well as his time to locate a new tenant. Furthermore, the landlord suffered a new vacancy due to the re-location of the existing tenant.

It was disputed by both parties as to whether the landlord had provided an attractive incentive in the form of lower monthly rent in return for a longer fixed-term tenancy. The tenant testified that they paid the monthly rent advertised by the landlord, and the

landlord had actually attempted to negotiate a higher rate of monthly rent as indicated by the communication between the parties.

The tenant does not dispute that she had moved out earlier than the date on the fix term agreement citing health issues that started in June of 2018 when she had fallen down some stairs. The tenant testified that she waited to end the tenancy a year later due to the deterioration of her hip and mobility. The tenant testified that it was impossible for her to walk, and she is now confined to a motorized wheelchair. The tenant testified that this was communicated to the landlord. The tenant feels that the landlord is not entitled to his claim as he was able to re-rent the rental unit for the same monthly rent. The tenant testified that the landlord was able to re-rent the unit as of June 2019.

The landlord disputes that the tenant had ever informed him of her medical issues and needs.

### **Analysis**

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 tenant did notify the landlord of the early termination of this tenancy, they did not end it in a manner that complies with the *Act*, as stated above. The landlord did not mutually agree to end this tenancy in writing, nor did the tenant obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No application for dispute resolution have been filed by the tenant in regards to this tenancy prior to July 31, 2019. The tenant moved out earlier than the date specified in the tenancy agreement.

The evidence is clear that the tenant did not comply with the *Act* in ending this fixed term tenancy, and I therefore, find that the tenant vacated the rental unit contrary to Sections 44 and 45 of the *Act*. I must now consider whether the landlord is entitled to the \$500.00 as set out in the liquidated damages clause.

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 landlord drafted the agreement calling for payment of \$500.00 as liquidated damages in the event that the tenant ended the tenancy before the end of the fixed term. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. 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 did not make a monetary claim for loss of rental income as they were able to mitigate their losses by re-renting the home for the same monthly rent, but applied for a \$500.00 liquidated damage fee to cover the other costs associated with finding a new suitable tenant. The landlord testified that although he had filled this vacancy, he did so by allowing an existing tenant to move to the rental unit, which meant the landlord was still left with a vacancy to fill.

I am satisfied that the landlord is entitled to a monetary award of \$500.00. I do so as I accept the landlord's assertion that this sum does not cover the true costs associated with the early termination of this fixed-term tenancy. I find this to be a reasonable estimate of the landlord's loss in the event of a breach to cover change over costs, such as advertising, interviewing, screening, and re-renting of the rental unit due to the early termination of this tenancy.

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 landlord is entitled to recover the \$100.00 filing fee paid for this application.

The landlord continues to hold the tenant's security deposit of \$1,000.00. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$600.00 of the tenant's security deposit in satisfaction of the monetary claim. As the landlord has no other active claims against the tenant at this time, I order that the landlord return the remaining \$400.00 to the tenant.

## **Conclusion**

I allow the landlord's monetary claim for \$500.00 in liquidated damages, as well as \$100.00 for recovery of the filing fee. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain \$600.00 of the tenant's security deposit in satisfaction of the monetary claim. As the landlord has no other active claims against the tenant at this time, I order that the landlord return the remaining \$400.00 to the tenant.

I issue a Monetary Order in the amount of \$400.00 in favour of the tenant for the return of the remaining portion of their security deposit.

The tenant is provided with this Order in the above terms and the landlord(s) must be served with a copy of this Order as soon as possible. Should the landlord(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 landlord withdrew the remaining portion of his claim. Liberty to reapply is not an extension of any applicable limitation period.

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: November 25, 2019

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Residential Tenancy Branch