



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding HO KIN CONSTRUCTION and  
[tenant name suppressed to protect privacy]

## DECISION

Dispute Codes      **FFL MNDCL-S**  
                             **FFT MNDCT MNSD**

### Introduction

This hearing dealt with applications filed by the landlord and the tenant pursuant to the Residential Tenancy *Act* ("Act").

The landlord applied for:

- Authorization to recover the filing fee for this application from the tenant pursuant to section 72; and
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67.

The tenant applied for:

- Authorization to recover the filing fees from the landlord pursuant to section 72;
- A monetary order for damages or compensation pursuant to section 67; and
- An order for the return of a security deposit or pet damage deposit pursuant to section 38.

Both the parties attended the hearing. The landlord was represented by its agent, property manager, EA ("landlord"). As both parties were in attendance, service of documents was examined. The tenant acknowledges receipt of the landlord's Application for Dispute Resolution and evidence. The landlord acknowledged receipt of the tenant's Application for Dispute Resolution, but not the evidence. The landlord testified that she was forwarded the tenant's Application for Dispute Resolution by the owner of the property, so it is possible the tenant's evidence was not forwarded to her. The tenant testified the evidence was included in the package she sent to the landlord by registered mail on August 20, 2019. The tracking number is recorded on the cover page of this decision. I find the evidence was served by the tenant 5 days after mailing in accordance with sections 88 and 90 of the *Act*.

Issue(s) to be Decided

Is the landlord entitled to a monetary order for liquidated damages?

Can the landlord retain the security deposit to cover the liquidated damages?

Is the tenant entitled to a doubled security deposit?

Can either of the parties recover the filing fee?

Background and Evidence

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

Copies of the tenancy agreement were entered into evidence by both the landlord and the tenant. This tenancy began on March 1, 2019 for a fixed term set to end on August 31, 2019. Rent was set at \$630.00 per month, payable on the first day of the month. A security deposit of \$315.00 was collected by the landlord which the landlord continues to hold. This tenancy agreement was signed on April 18, 2019.

Attached to the tenancy agreement is a second document, referred to as an addendum signed on February 11<sup>th</sup> (year not specified). This document, signed by the tenant and not the landlord, includes the following term:

*Liquidated damages. If the tenant terminates the tenancy before the end of the original term, the landlord may treat the tenancy agreement as being at an end. In such event, the sum of the security deposit shall be paid by the tenant to the landlord as liquidated damages, and not a penalty.*

The parties agree that after moving into the rental unit, the tenant asked the landlord for a tenancy agreement drafted on the Residential Tenancy Branch form and the original tenancy agreement was made into an addendum to the tenancy agreement signed on April 18<sup>th</sup>.

The landlord testified that a condition inspection report was not done with the tenant at the commencement of the tenancy. No formal written opportunities for an initial inspection were given by the landlord to the tenant. The tenant acknowledges she was happy with the condition of the unit when she moved in. She even went back twice to

see it before moving in, however she became dissatisfied with noises made by the other occupants in the house after the tenancy began.

The parties agree that the tenant served the landlord with a One Month Notice To End Tenancy on either June 25 or June 27 by email. The email states the tenant is terminating the 'lease' effective July 31, 2019, (one month earlier than the original fixed term end date) and provides the tenant's forwarding address. The Notice also seeks to have the security deposit returned to the tenant. The tenant asked the landlord to sign a mutual agreement to end the tenancy, however the landlord would not sign it.

The landlord provided the following testimony. Pursuant to the term of the original tenancy agreement, the landlord is entitled to retain the security deposit as a liquidated damage because the tenant ended the tenancy early. The person attending the hearing today is a contracted property manager who charges the owner of the property a fee of one half month's rent to advertise for a new tenant, travel to and from the rental unit to show it, and place a new tenant in the unit. The landlord's agent mitigated the damages sought by using low-cost advertising such as free online ads and word of mouth to find a new tenant. The landlord's agent acknowledged that the same work would be done and charged back to the owner of the property if the tenancy had ended in accordance with the fixed term tenancy agreement.

The landlord testified that she gave the tenant a time to meet to do a condition inspection report at the end of the tenancy, however the tenant was unable to meet her at the designated time. The tenant gave the landlord permission to go into her room and inspect alone and the landlord was satisfied with the condition of the rental unit.

A new tenant was found and the new tenant signed a tenancy agreement with the landlord to commence on August 1, 2019.

### Analysis

- Landlord's claim for liquidated damages

Residential Tenancy Policy Guideline PG-4 provides guidance to landlords and tenant's with respect to 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. 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. (emphasis added)***

For the landlord's claim of a security deposit as a liquidated claim to succeed, there has to be a genuine pre-estimate of loss. The property was re-rented for August 1<sup>st</sup>, meaning the landlord did not suffer any loss of rental income between the effective date on the tenant's One Month Notice To End Tenancy and the end date stipulated on the fixed term agreement.

The landlord's agent testified that she would charge the owner of the property a fee to re-rent the unit no matter how the previous tenancy ends. Therefore, the landlord's agent's fees are costs of doing business that the landlord has already factored in when hiring the agent to manage his property. Lastly, the landlord's agent has not provided documentary evidence such as invoices, ledgers or receipts to show specific costs associated with re-renting the unit that wouldn't have been paid if the tenancy had ended on August 31<sup>st</sup> instead of July 31<sup>st</sup>. It appears the landlord/owner of the rental unit would incur the costs of his agent in either case. For these reasons, I find the liquidated damages clause to be a penalty and not a genuine estimate of loss. The landlord is not entitled to the compensation as laid out in term 3 of the addendum to the tenancy agreement and I dismiss the landlord's claim for the liquidated claim.

- Tenant's claim for return of the security deposit

At the commencement of the tenancy, the landlord did not pursue a condition inspection of the suite with the tenant, as required by section 23 of the *Act*. (reproduced below)

**23 Condition inspection: start of tenancy or new pet**

- (1) The landlord and tenant together must inspect the condition of the rental unit on the day the tenant is entitled to possession of the rental unit or on another mutually agreed day.
- (2) The landlord and tenant together must inspect the condition of the rental unit on or before the day the tenant starts keeping a pet or on another mutually agreed day, if
  - (a) the landlord permits the tenant to keep a pet on the residential property after the start of a tenancy, and
  - (b) a previous inspection was not completed under subsection (1).
- (3) The landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection.
- (4) The landlord must complete a condition inspection report in accordance with the regulations.
- (5) Both the landlord and tenant must sign the condition inspection report and the landlord must give the tenant a copy of that report in accordance with the regulations.
- (6) The landlord must make the inspection and complete and sign the report without the tenant if
  - (a) the landlord has complied with subsection (3), and
  - (b) the tenant does not participate on either occasion.

Pursuant to section 24, the landlord's right to claim against the security deposit **is extinguished** if the landlord does not offer the tenant at least two opportunities for inspection.

Section 38(5) and (6) of the *Act* state that when the landlord's right to claim against the security deposit is extinguished, the landlord may not make a claim against it and must pay the tenant double the amount of the security deposit or pet damage deposit, or both, as applicable. This is further clarified in Residential Tenancy Branch Policy Guideline PG-17 which says, in part C-3:

*Unless the tenant has specifically waived the doubling of the deposit, either on an application for the return of the deposit or at the hearing, the arbitrator will order the return of double the deposit if the landlord has claimed against the deposit for damage to the rental unit and the landlord's right to make such a claim has been extinguished under the Act;*

In this case, section 38(6) requires that the tenant's security deposit of \$315.00 be doubled to \$630.00.

I award a monetary order to the tenant in the amount of \$630.00. As the tenant's application was successful, the tenant is also entitled to recovery of the \$100.00 filing fee.

Conclusion

I issue a monetary order in the tenant's favour in the amount of **\$730.00**.

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: December 4, 2019

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Residential Tenancy Branch