



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding PORT ROYAL VILLAGE DEVELOPMENTS
INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes FFT MNDCT MNSD MNDCL-S MNRL-S

Introduction

This hearing dealt with applications from both the landlord and tenants pursuant to the *Residential Tenancy Act* (the “Act”).

The landlord applied for:

- A monetary award for damages and loss pursuant to section 67; and
- Authorization to retain the security and pet damage deposits for this tenancy pursuant to section 38.

The tenants applied for:

- A monetary award for damages and loss pursuant to section 67;
- A return of the security and pet damage deposits for this tenancy pursuant to section 38; and
- Authorization to recover the filing fee from the landlord pursuant to section 72.

Both parties attended the hearing and were given a full opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The corporate landlord was represented by its agents. Agent SR (the “landlord”) primarily spoke on behalf of the landlord. The tenant EG (the “tenant”) primarily spoke on behalf of all the tenants.

As both parties were present service was confirmed. The parties each testified that they had been served with all of the respective materials. Based on the testimonies I find each party was served with the materials in accordance with sections 88 and 89 of the *Act*.

Issue(s) to be Decided

Is either party entitled to a monetary award as claimed?

Is either party entitled to the security and pet damage deposit for this tenancy?

Are the tenants entitled to recover the filing fee from the landlord?

Background and Evidence

The parties agreed on the following facts. This fixed term tenancy began in October 2018 and was scheduled to end on September 30, 2019. The monthly rent was \$2,755.00 payable on the first of each month. Automatic withdrawals was set up for payment of rent. A security deposit of \$1,377.50 and pet damage deposit of \$1,377.50 were paid at the start of the tenancy and is still held by the landlord. The written tenancy agreement submitted into evidence contains a liquidated damage clause where the landlord is entitled to an amount of \$750.00 should the tenants end the tenancy prior to the full term.

The tenants gave notice to the landlord to end the tenancy on June 28, 2019 and vacated the rental unit by July 31, 2019. The tenants made full payment of rent through July 2019. The tenants put a stop payment on the withdrawal from their account in August, 2019 and no amount was paid towards rent. The landlord was able to deduct \$2,755.00 from the tenants' account in September 2019. The landlord was able to find a new occupant to take possession of the rental unit for September 16, 2019. The landlord seeks a monetary award for the equivalent of half a month's rent, \$1,377.50, the amount they say is in arrears for this tenancy.

The landlord also seeks a monetary award for the NSF charges and late fees in the amounts of \$75.00 and \$50.00 respectively. The landlord further seeks the amount of \$750.00 for liquidated damage.

The parties completed a condition inspection report and the landlord submits that they incurred the amount of \$189.00 for cleaning the blinds. The tenant agrees with the deduction of \$189.00 from their deposit for blind cleaning.

The tenant submits that they ended the tenancy as there were a number of recent break-ins to the rental property prior to the end of the tenancy and they had grounds to break the fixed-term tenancy.

Analysis

Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

As the parties agree to the landlord's deduction of \$189.00 for the cost of drape cleaning, I find that the landlord has established this portion of their claim.

Section 45 (2) of the *Act* provides that a tenant may end a fixed term tenancy by giving the landlord notice effective on a date that is not earlier than the date specified in the tenancy agreement and is the day before the day in the month that rent is payable in the tenancy agreement. In this case, the parties gave evidence that the tenants gave notice on June 28, 2019 and moved out on July 31, 2019.

Section 7 of the *Act* explains, "If a tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying tenant must compensate the other for damage or loss that results... A landlord 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."

This issue is expanded upon in *Residential Tenancy Policy Guideline #5* which explains that, "Where the tenant gives written notice that complies with the Legislation but specifies a time that is earlier than that permitted by the tenancy agreement, the landlord is not required to rent the rental unit or site for the earlier date. The landlord must make reasonable efforts to find a new tenant to move in on the date following the date that the notice takes legal effect."

I find that the landlord has provided little evidence to show what steps they have taken to mitigate their losses. The landlord provided no written evidence showing the suite being advertised, no records of showings or details about the process by which they sought a new occupant. The primary evidence appears to be that the landlord withdrew the monthly rent payment from the tenants' bank account after the tenants had vacated. I find that there is little evidence that the landlord took any action that would be

reasonable to mitigate their losses. I find in the absence of evidence showing the steps undertaken by the landlord that any loss of rental income is attributable to the landlord's failure to act reasonably under the circumstances. As such, I find that the landlord has not shown that they are entitled to a monetary award for unpaid rent as claimed. Similarly, I find that any NSF fees and late charges that flow from non-payment of rent is not attributable to the breach on the part of the tenants and not an amount that can be claimed by the landlord.

I am satisfied that the signed tenancy agreement contains a liquidated damage clause allowing the landlord to recover an amount of \$750.00, if the tenants end the fixed term tenancy earlier than the full term. I find that the amount of the damage, the circumstances in which the amount becomes payable, and the evidence regarding the manner by which the amount was pre-estimated is sufficient to establish that this is a true liquidated damage clause and not a penalty clause.

Residential Tenancy Policy Guideline 4 provides that:

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.

Consequently, I find that the landlord is entitled to a monetary award in the amount of \$750.00 for this item.

Section 38 of the *Act* requires the landlord to either return the tenant's security deposit in full or file for dispute resolution for authorization to retain the deposit 15 days after the later of the end of a tenancy or upon receipt of the tenant's forwarding address in writing.

In the matter at hand I find that the tenancy ended July 31, 2019 and the landlord applied for dispute resolution on August 9, 2019, within the 15 days granted under the *Act*.

The tenants seek a monetary award for the return of the \$2,755.00 amount withdrawn in September, 2019 and the deposits for this tenancy.

Section 22 of the *Act* states that:

A tenancy agreement must not include a term that all or part of the rent payable for the remainder of the period of the tenancy agreement becomes due and payable if a term of the tenancy agreement is breached.

I find that any portion of the tenancy agreement which purports to grant the landlord the ability to continue to withdraw from the tenants' bank account to be an acceleration clause in direct contravention of the Act and therefore unenforceable.

I find that the landlord has no basis to continue to deduct funds from the tenants' bank account and the withdrawal of \$2,755.00 was a violation of the *Act*. As such, I find that the tenant is entitled to a monetary award in that amount.

I accept the evidence of the tenants that they have authorized the deduction of \$189.00 from the deposits for this tenancy but have given no permission that any additional amount may be deducted. Accordingly, I find that the tenants are entitled to a return of \$2,566.00 of the deposits for this tenancy.

As the tenants were successful in their application they are also entitled to recover their \$100.00 filing fee.

Conclusion

I issue a monetary order in the tenants' favour in the amount of \$292.50 under the following terms:

Item	Amount
Return of September 2019 bank withdrawal	\$2,755.00
Security Deposit	\$1,377.50
Pet Damage Deposit	\$1,377.50
Filing Fee	\$100.00
Less Liquidated Damage	-\$750.00
Less Agreed Upon Cleaning Cost	-\$189.00
TOTAL	\$4,671.00

The landlord must be served with this Order as soon as possible. Should the landlord 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.

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 2, 2019

Residential Tenancy Branch