



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes FFL, MNDCL-S, MNRL-S

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on September 11, 2019 (the “Application”). The Landlord sought compensation for monetary loss or other money owed, to recover unpaid rent, to keep the security deposit and reimbursement for the filing fee.

The Landlord appeared at the hearing. The Tenant did not appear at the hearing. I explained the hearing process to the Landlord who did not have questions when asked. The Landlord provided affirmed testimony.

The Landlord confirmed the rental unit address and Tenant’s full legal name, both of which are reflected on the front page of this decision.

The Landlord submitted evidence prior to the hearing. The Tenant did not. I addressed service of the hearing package and evidence.

The Landlord testified that the hearing package and evidence were sent by registered mail to the Tenant’s forwarding address on September 20, 2019. The Landlord provided Tracking Number 1. I looked this up on the Canada Post website which shows the package was delivered and signed for September 23, 2019.

Based on the undisputed testimony of the Landlord and Canada Post website information, I find the Tenant was served with the hearing package and evidence in accordance with sections 88(d) and 89(1)(d) of the *Residential Tenancy Act* (the “Act”). Based on the Canada Post website information, I find the Tenant received the package September 23, 2019, in sufficient time to prepare for, and appear at, the hearing.

Given I was satisfied of service, I proceeded with the hearing in the absence of the Tenant. The Landlord was given an opportunity to present relevant evidence and make relevant submissions. I have considered all testimony provided and reviewed all documentary evidence submitted. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

1. Is the Landlord entitled to compensation for monetary loss or other money owed?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to keep the security deposit?
4. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought the following compensation:

Item	Description	Amount
1	50% of city electrical utilities for one month	\$89.90
2	50% of gas bill for one month	\$83.97
3	50% of May rent	\$650.00
4	Filing fee	\$100.00
	TOTAL	\$923.87

A written tenancy agreement was submitted as evidence. The tenancy started April 01, 2019 and was for a fixed term ending March 31, 2020. Rent was \$1,300.00 due on the first day of each month. The Tenant paid a \$650.00 security deposit.

The tenancy agreement shows that utilities are not included in rent and states:

Tenant pays 50% hydro and gas. 100% when empty.

The tenancy agreement includes an addendum which includes a liquidated damages clause stating the Tenant will pay the Landlord an amount equal to half a month's rent if the Tenant ends the fixed term tenancy early.

The Landlord testified that the tenancy ended May 01, 2019.

In relation to the Tenant's forwarding address, the Landlord referred to File Number 1. The Arbitrator in the decision on File Number 1 stated:

The Tenant never provided the Landlord with their forwarding address in writing until serving the Landlord with the Notice of Dispute Resolution Proceeding...

I find that the Landlord is now aware of the Tenant's address. The Landlord has 15 days from the date of this decision to repay the security deposit or make application for dispute resolution to make claim against it. If the Landlord does not return the deposit or make claim against the deposit, within 15 days, the Tenant may reapply for dispute resolution.

The decision is dated August 27, 2019.

The Landlord testified as follows. The Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy. The Tenant did not agree in writing at the end of the tenancy that the Landlord could keep some or all of the security deposit.

The Landlord testified that a move-in inspection was not done and the Tenant was not provided two opportunities to do a move-in inspection.

The Landlord testified that he completed a move-out inspection on his own. He testified that the Tenant was offered two opportunities to do the inspection but not on the RTB form.

50% of city electrical utilities for one month

The Landlord testified that the agreement between the parties was that the Tenant would pay hydro and gas. He said the rental unit address has two levels and the agreement was that the Tenant would pay 50% of the utilities unless the second level was empty in which case the Tenant would pay 100% of the utilities. The Landlord confirmed the second level of the rental unit address was occupied during the tenancy and therefore the Landlord is seeking 50% of the utilities.

The Landlord submitted the city electrical bill. It is for the period from April 03, 2019 to May 31, 2019. The bill is for \$359.60. The Landlord said he divided the amount by two

and two again to get \$89.90. The Landlord testified that the Tenant never paid this bill. The Landlord testified that he provided the Tenant the bill as evidence on the previous hearing.

50% of gas bill for one month

The Landlord submitted the gas bill which is for the period from February 08 to April 08, 2019. The amount of the bill is \$503.67. The Landlord said he calculated the amount owing by the Tenant by dividing the \$503.67 by three and then two to get \$83.97. The Landlord acknowledged the bill only covers eight days of April 2019. The Landlord testified that the Tenant never paid this bill. The Landlord testified that he provided the Tenant the bill as evidence on the previous hearing.

50% of May rent

The Landlord testified as follows. The Tenant told the Landlord verbally that he was vacating the rental unit approximately one week prior to May 01, 2019. The Tenant vacated the rental unit on the evening of May 01, 2019. The Tenant never gave written notice ending the tenancy. The Tenant paid April rent but not May rent. The Tenant did not clean the rental unit. The Landlord had no opportunity to re-rent the unit for May. The Landlord had to clean the unit and then showed it to prospective tenants. The Landlord posted the unit for rent on a rental website approximately one week after the Tenant vacated. The unit was posted for \$1,550.00 per month. The unit was re-rented for June 01, 2019 for \$1,500.00 for a one year fixed term.

The Landlord confirmed he is relying on term four in the addendum being the liquidated damages clause.

Analysis

Security deposit

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Regulations*. Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Given the testimony of the Landlord about move-in and move-out inspections, there is no basis to find that the Tenant extinguished his rights in relation to the security deposit under sections 24 or 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished his rights in relation to the security deposit under sections 24 or 36 of the *Act* as extinguishment relates to claims for damage and the Landlord has claimed for unpaid utilities and rent.

Based on the undisputed testimony of the Landlord, I find the tenancy ended May 01, 2019.

Based on the decision on File Number 1, I find the Landlord received the Tenant's forwarding address August 27, 2019, the date of the decision. The Landlord had 15 days from August 27, 2019 to repay the security deposit or file a claim against it pursuant to the decision on File Number 1 and section 38(1) of the *Act*. The Application was filed September 11, 2019, within 15 days of August 27, 2019. I find the Landlord complied with the decision on File Number 1 and with section 38(1) of the *Act*.

Compensation

Section 7(1) of the *Act* states:

7 (1) If a...tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying...tenant must compensate the [landlord] for damage or loss that results.

(2) A landlord...who claims compensation for damage or loss that results from the [tenant's] non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

50% of city electrical utilities for one month

Based on the written tenancy agreement, I find the Tenant was required to pay for electricity during the tenancy. Based on the undisputed testimony of the Landlord, I find the agreement was that the Tenant would pay for 50% of the electrical bill during the tenancy if the second level of the rental unit address was occupied.

Based on the city electrical bill, I find electricity was \$359.60 for the period from April 03, 2019 to May 31, 2019. Based on the written tenancy agreement and undisputed

testimony of the Landlord, I find the Tenant was in the rental unit from April 01, 2019 to May 01, 2019.

I have calculated the amount owing on a daily basis given the billing period. I find the Tenant owed the following:

$$\begin{aligned} \$359.60/59 \text{ (days in billing period)} &= \$6.09 \text{ per day} \times 29 \text{ (days in rental unit)} = \\ \$176.61/2 \text{ (50\% owing)} &= \$88.30 \end{aligned}$$

Based on the undisputed testimony of the Landlord, I find the Tenant was provided the city electrical bill for the hearing in August of 2019 and again in September for this hearing.

Based on the undisputed testimony of the Landlord, I find the Tenant did not pay his portion of the city electrical bill as he was required to do pursuant to the tenancy agreement.

I find the Landlord is entitled to recover \$88.30 from the Tenant for the city electrical bill.

50% of gas bill for one month

Based on the written tenancy agreement and undisputed testimony of the Landlord, I find the Tenant was required to pay 50% of the gas bill during the tenancy.

Based on the gas bill, I find gas was \$503.67 for the period from February 08 to April 08, 2019. I have already found that the Tenant was in the rental unit from April 01, 2019 to May 01, 2019. Therefore, the Tenant only owes for gas for eight of the billing days.

I have calculated the amount owing on a daily basis given the above. I find the Tenant owed the following:

$$\begin{aligned} \$503.67/60 \text{ (days in billing period)} &= \$8.39 \text{ per day} \times 8 \text{ (days in rental unit)} = \\ \$67.12/2 \text{ (50\% owing)} &= \$33.56 \end{aligned}$$

Based on the undisputed testimony of the Landlord, I find the Tenant was provided the gas bill for the hearing in August of 2019 and again in September for this hearing.

Based on the undisputed testimony of the Landlord, I find the Tenant did not pay his portion of the gas bill as he was required to do pursuant to the tenancy agreement.

I find the Landlord is entitled to recover \$33.56 from the Tenant for the gas bill.

50% of May rent

Based on the written tenancy agreement, I accept that the tenancy was for a fixed term ending March 31, 2020. Based on the undisputed testimony of the Landlord, I accept that the Tenant vacated the rental unit May 01, 2019 with only one week's verbal notice.

Section 45 of the *Act* states:

(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.

I find the Tenant breached section 45(2) of the *Act*. However, I decline to award the Landlord compensation for loss of rent as I find the Landlord failed to mitigate the loss by posting the rental unit for \$1,550.00 per month, \$250.00 more than what the Tenant was paying. Further, the Landlord rented the unit for \$1,500.00 per month, \$200.00 per month more than what the Tenant would have paid over the fixed term.

However, the Landlord confirmed he was relying on term four of the addendum to the tenancy agreement which states:

If the tenant request leaving before the end of the original terms as set out in ITEM-2 of this Residential Tenancy Agreement, the Tenant shall pay the Landlord's loss in rent if any due to early termination of rental fixed lease. Also the Tenant shall pay \$ (amount equal to half month rent) not as a penalty, to cover the agent's rent-up fee of the said premises...

I find the Tenant did end the fixed term tenancy early as he vacated May 01, 2019. Therefore, I find term four in the addendum applies. The addendum was part of the

tenancy agreement and initialled by the parties. The Tenant is bound by term four of the addendum.

Policy Guideline 4 deals with liquidated damages clauses and states in part the following:

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

Here, the liquidated damages clause is for half the monthly rent. Based on term four in the addendum, I am satisfied the amount was a genuine pre-estimate of the loss relating to the Tenant ending the fixed term tenancy early and the Landlord incurring costs associated with re-renting the unit. I do not find the amount extravagant in comparison to the greatest loss that could follow the stated breach given the costs associated with re-renting a unit. I do not find the amount oppressive, given it is half the monthly rent. I am satisfied the liquidated damages clause is enforceable. I find the

Tenant is obligated to pay the Landlord \$650.00, half the monthly rent, for ending the fixed term tenancy early.

Filing fee

Given the Landlord was partially successful in this application, I award him reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

Summary

In summary, the Landlord is entitled to the following:

Item	Description	Amount
1	50% of city electrical utilities for one month	\$88.30
2	50% of gas bill for one month	\$33.56
3	50% of May rent	\$650.00
4	Filing fee	\$100.00
	TOTAL	\$871.86

The Landlord can keep the \$650.00 security deposit pursuant to section 72(2) of the *Act*. The Landlord is issued a monetary order for the remaining \$221.86 pursuant to section 67 of the *Act*.

Conclusion

The Landlord is entitled to \$871.86. The Landlord can keep the \$650.00 security deposit. The Landlord is issued a monetary order for the remaining \$221.86. This Order must be served on the Tenant. If the Tenant fails to comply with this Order, it 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 *Act*.

Dated: February 03, 2020

Residential Tenancy Branch