



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDL-S, MNRL-S, MNDCL-S, FFL

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on October 09, 2019 (the “Application”). The Landlord applied as follows:

- For compensation for damage to the rental unit;
- To recover unpaid rent;
- For compensation for monetary loss or other money owed;
- To keep the security deposit; and
- For reimbursement for the filing fee.

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

The Landlord submitted evidence prior to the hearing. The Tenants did not. I addressed service of the hearing package and Landlord’s evidence and no issues arose.

The parties were 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 damage to the rental unit?
2. Is the Landlord entitled to recover unpaid rent?
3. Is the Landlord entitled to compensation for monetary loss or other money owed?

4. Is the Landlord entitled to keep the security deposit?
5. Is the Landlord entitled to reimbursement for the filing fee?

Background and Evidence

The Landlord sought the following compensation:

Item	Description	Amount
1	Damage – screw holes in wall and water damage to window ledge	\$203.23
2	Utilities	\$38.25
3	Liquidated Damages – advertising	\$52.50
4	Liquidated Damages – cost to find another tenant	\$476.00
5	October rent	\$1,400.00
6	Filing fee	\$100.00
	TOTAL	\$2,269.98

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started September 01, 2019 and was for a fixed term ending August 31, 2020. Rent was \$1,400.00 per month due on or before the first day of each month. The Tenants paid a \$700.00 security deposit.

The parties agreed the tenancy ended September 30, 2019.

The Tenant testified that a forwarding address was provided on the Condition Inspection Report (CIR). He testified that the address was wrong and so the Tenants sent the Landlord the correct address by text October 01, 2019. He testified that the Tenants also mailed the correct address to the Landlord at the end of October.

The Landlord acknowledged receiving the forwarding address on the CIR. She testified she received the text from the Tenants. She could not recall when she received the text. The Landlord testified that she received a letter with the forwarding address as well but that this was left in her door and not mailed. She could not recall when she received the letter.

The parties agreed they did a move-in inspection September 02, 2019 and completed and signed the CIR. The Tenant testified that the Landlord gave the Tenants the CIR during the inspection, they completed it and gave it back to the Landlord. He testified that the Tenants kept a copy. The Landlord generally agreed with this.

The parties agreed they did a move-out inspection September 30, 2019 and completed and signed the CIR. The parties agreed the Landlord gave the Tenants a copy of the CIR at the end of the inspection.

Damage – screw holes in wall and water damage to window ledge

The Landlord testified as follows. The rental unit was freshly painted for the Tenants prior to move-in. The Tenants had plants on the window ledge. The Tenants over watered the plants which damaged the ledge. The damaged area had to be sanded and re-painted.

The Landlord further testified as follows. The Tenants hung something on the wall which left large screw holes. It says in the tenancy agreement not to use large screws and to only use small nails to hang items. The holes had to be mudded and the whole wall had to be re-painted.

The Landlord referred to photos submitted showing the above damage. The Landlord referred to an estimate submitted for the cost of labour and materials in relation to the above damage.

The CIR shows the kitchen walls and trim were fine on move-in and damaged on move-out. The CIR shows the living room windows/coverings/screens were missing and damaged on move-in. It states there was “water ledge damage” on move-out. Under “End of Tenancy” and “Damage to rental unit...for which the tenant is responsible” it states, “window ledge damage from over watering plant.” The Tenants did not indicate whether they agreed or disagreed with the CIR, despite there being a space to do so. The Tenants signed the move-out CIR.

The Tenant testified that Tenant K.S.’s mother installed a rack upon move-in. He acknowledged that large screws were used for this and should not have been.

In relation to the window ledge, the Tenant testified that the damage was from the window leaking. The Tenant referred to photo 1 and submitted that this photo shows the leaking. The Tenant testified that the Tenants should have brought this to the Landlord’s attention but did not.

I asked the Tenant why the Tenants signed the move-out CIR if they did not agree that the window ledge damage was from over watering a plant. The Tenant testified that he was not paying attention when he signed the CIR.

In reply, the Landlord denied that the window has ever leaked.

Utilities

The Tenant agreed to pay the Landlord \$38.25 for utilities.

Liquidated Damages – advertising and cost to find another tenant

In relation to the request for \$528.50 for liquidated damages relating to advertising and finding new tenants, I asked the Landlord why she is seeking this amount when the tenancy agreement states liquidated damages will be \$450.00. The Landlord said she wanted to show evidence of the actual cost and that \$450.00 is fine.

The Landlord relied on a paragraph in the tenancy agreement which states:

In the event that the Tenant breaches the terms of this contract, the Tenant agrees to pay the liquidated damages in the amount of \$450. Liquidated damages are directly related to **all** costs associated with re-renting the suite.

The Landlord testified that the Tenants breached the tenancy agreement by breaking the lease and not providing one month notice. The Landlord testified that there were costs associated with advertising the rental unit as well as time spent doing showings and vetting tenants. The Landlord testified that she had just gone through this process to secure the Tenants.

The Landlord submitted the Tenants' notice ending the tenancy.

The Tenant acknowledged that the Tenants breached the tenancy agreement and *Residential Tenancy Act* (the "Act") by ending the tenancy early. The Tenant acknowledged that the Landlord is entitled to \$450.00 for liquidated damages. The Tenant testified that he spoke to the RTB and was told this would cover loss of rent. The Tenant submitted that the Landlord is not entitled to both liquidated damages and loss of rent for October. The Tenant raised issues with the rental unit.

I asked the Tenant to further explain his position and reasoning for the submission that the Landlord is not entitled to both liquidated damages and loss of rent for October. The Tenant again raised issues with the rental unit. He testified that the Tenants had to move out of the rental unit. The Tenant did not explain his position that the Landlord is not entitled to both liquidated damages and loss of rent for October further. The Tenant

did not point to any section of the *Act* or a Policy Guideline that he was relying on for his position.

October rent

The Landlord testified as follows. The Tenants gave notice ending the tenancy September 18, 2019. She received the notice September 19, 2019. She posted the unit for rent on a rental website and social media website on September 19, 2019 for the same rent amount. Around October 05, 2019, she reduced the rent amount by \$50.00. She could not secure a new tenant for October. She found a new tenant for November 01, 2019.

The Landlord submitted a receipt for advertising the rental unit dated September 19, 2019. The Landlord submitted emails and texts between the parties about showing the rental unit.

The Tenant submitted that the liquidated damages clause in the tenancy agreement covers loss of rent for October.

The Tenant also testified that he saw someone moving into the rental unit mid October and took the position that the Landlord rented the unit out for mid October.

The Tenant testified that the Tenants felt mislead about the condition of the rental unit. The Tenant testified that the Tenants told the Landlord why they were leaving when they gave notice ending the tenancy. The Tenant acknowledged the Tenants did not give the Landlord written notice of a breach of a material term of the tenancy agreement with a reasonable period to correct it.

In reply, the Landlord testified that the new tenant moved some of their belongings into the rental unit early but that the tenancy agreement started November 01, 2019.

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 *Residential Tenancy Regulation* (the “*Regulations*”). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Based on the testimony of both parties, I accept that the Tenants participated in the move-in and move-out inspections and therefore did not extinguish their 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 her rights in relation to the security deposit under sections 24 or 36 of the *Act* as extinguishment only relates to claims for damage to the rental unit and the Landlord has claimed for utilities, liquidated damages and loss of October rent.

Based on the testimony of both parties, I accept that the tenancy ended September 30, 2019.

I accept the testimony of the Tenant that a forwarding address was provided on the CIR September 30, 2019, by text October 01, 2019 and in a letter at the end of October given the following. The Landlord agreed she received the forwarding address on the CIR. The Landlord acknowledged receiving the text. The Landlord did not dispute that the text was sent October 01, 2019, she simply could not recall when she received the text. The Landlord acknowledged receiving the forwarding address in a letter, although she disputed how the letter was sent. I do not find how the letter was sent relevant in the circumstances.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from the later of the end of the tenancy or the date the Landlord received the Tenants' forwarding address in writing to repay the security deposit or claim against it. The Application was filed October 09, 2019. This was within 15 days of the end of the tenancy. It was within 15 days of the Landlord receiving a forwarding address on the CIR. It was within 15 days of the text sent October 01, 2019. It was prior to the Landlord receiving the forwarding address in a letter. It is clear the Landlord complied with section 38(1) of the *Act*.

Compensation

Section 7 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. (emphasis added)

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

Pursuant to rule 6.6 of the Rules of Procedure, it is the Landlord as applicant who has the onus to prove the claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Damage – screw holes in wall and water damage to window ledge

Section 37 of the *Act* states:

- (2) When a tenant vacates a rental unit, the tenant must
 - (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear...

Policy Guideline 01 states:

The tenant must pay for repairing walls where there are an excessive number of nail holes, or large nails, or screws or tape have been used and left wall damage.

The tenancy agreement states that picture hooks are to be used to hang items and that big nails, plastic plugs or stick-on hangers are considered to be damage.

The Tenant acknowledged that the Tenants are responsible for putting large screws in the wall and that they should not have used large screws. Based on this, the photos and the CIR, I am satisfied the Tenants breached section 37 of the *Act* in relation to the screw holes. Based on the same evidence, I am satisfied the Landlord was entitled to repair the damage.

In relation to the water damage to the window ledge, the Tenant testified that this was from the window leaking and referred to photo 1. I have looked at the photos submitted and am not satisfied they show the window is leaking.

I am satisfied from the photos as well as the location, shape and type of water damage shown that it is more likely than not from watering plants. I also find that the move-out CIR supports the position of the Landlord and does not support the position of the Tenant. If the Tenants disagreed with the move-out CIR and statements on it, they should have indicated this on the move-out CIR in the space provided. The Tenants did not do so and signed the move-out CIR. I view this as acceptance of the CIR and statements on it. It is not sufficient for the Tenant to say he was not paying attention when the move-out CIR was completed and signed. The CIR is an important document in relation to this tenancy and the Tenants should have paid attention to what they were signing.

I am satisfied based on the photos and CIR that the damage to the window ledge is beyond reasonable wear and tear and that the Tenants breached section 37 of the *Act* in this regard. Based on the same evidence, I am satisfied the Landlord was entitled to repair the damage.

Based on the estimate, I am satisfied that the cost of repairing the screw holes and water damage to the window ledge is \$203.23. I find this amount reasonable and award the Landlord this amount.

Utilities

The Landlord is awarded the \$38.25 sought for utilities based on the Tenant's agreement to pay this.

Liquidated Damages – advertising and cost to find another tenant

Policy Guideline 04 deals with liquidated damages and states in part:

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 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.

I do not accept that the Landlord can seek more than \$450.00 for the costs associated with re-renting the unit due to the Tenants ending the fixed term tenancy early. This is what the liquidated damages clause covers as is clear from the wording of the tenancy agreement. The Landlord is limited to compensation in the amount of \$450.00.

There is no issue that the Tenants breached the tenancy agreement by ending the fixed term tenancy early. I find the liquidated damages clause in the tenancy agreement applies.

The Tenant did not submit that the Tenants are not bound by the liquidated damages clause and acknowledged that the Landlord is entitled to the \$450.00 for liquidated damages.

I am satisfied based on the tenancy agreement, amount and submissions of the Tenant that the liquidated damages clause was a genuine pre-estimate of the loss at the time the contract was entered into. I do not find the amount extravagant in relation to the loss associated with having to re-rent the unit. Nor do I find the amount oppressive. In coming to these conclusions, I have considered the time and expense involved in re-renting the unit as described by the Landlord. I have also considered that the liquidated damages amount is less than half the monthly rent amount.

I am satisfied the liquidated damages clause is not a penalty and is enforceable. I am satisfied it applies here and that the Tenants are bound by it. I am satisfied the Landlord is entitled to \$450.00 for liquidated damages.

October rent

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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

There is no issue that the Tenants ended the fixed term tenancy early. I am not satisfied section 45(3) of the *Act* applies as the Tenant acknowledged the Tenants did not give the Landlord written notice of a breach of a material term of the tenancy agreement and a deadline for correcting it. I am satisfied the Tenants breached the tenancy agreement and *Act* by ending the fixed term tenancy early.

I am satisfied the Landlord lost half of October rent due to the Tenants' breach. The Landlord testified that she lost all of October rent as the new tenancy did not start until November 01, 2019. The Tenant disputed this and testified that he saw someone moving into the unit mid October. I understood the Landlord to acknowledge that the Tenant could have seen someone moving into the unit mid October as the Landlord stated that the new tenant moved some of their belongings in early. This causes me to question when the new tenancy started. This is the Landlord's application and the Landlord has the onus to prove that the new tenancy did not start until November 01, 2019. The Landlord has not submitted further evidence to support her testimony that the new tenancy did not start until November 01, 2019. For example, the Landlord has not submitted the new tenancy agreement showing it started November 01, 2019, which would have been simple evidence to submit.

In the circumstances, I am not satisfied the Landlord lost all of October rent but am satisfied the Landlord lost half of October rent.

In relation to mitigation, I am satisfied the Landlord mitigated the loss. Based on the emails and texts about showing the unit as well as the receipt for advertising the unit, I accept that the Landlord posted the unit for rent and made attempts to re-rent the unit immediately once receiving the Tenants' notice ending the tenancy. Further, the Landlord did not receive the Tenants' notice until September 19, 2019. It would be unreasonable to expect the Landlord to have re-rented the unit for October 01, 2019.

The Tenant submitted that the Landlord is not entitled to both liquidated damages and loss of rent for October. The Tenant said he spoke to people at the RTB who stated this. The Tenant did not point to a section of the *Act* that supports this. The Tenant did not point to a Policy Guideline that states this.

I do not accept that the Landlord is not entitled to both liquidated damages and loss of rent for October given the wording of the liquidated damages clause in the tenancy agreement which specifically states it relates to the costs associated with re-renting the unit. It does not state it covers loss of rent. The costs associated with re-renting the unit such as the costs of advertising, showing the unit and vetting applicants is separate from the issue of loss of rent which relates to the Landlord not getting rent for October because the Tenants ended the fixed term tenancy agreement early and the Landlord could not re-rent the unit for October. The Landlord is entitled to claim for both liquidated damages and loss of rent.

The Tenant raised the issue of the condition of the rental unit. I do not find this relevant when the Tenants did not attempt to end the tenancy in compliance with section 45(3) of the *Act*.

In the circumstances, the Landlord is entitled to \$700.00 for loss of half of October rent.

Filing fee

Given the Landlord was mostly successful in this application, I award the Landlord 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	Damage – screw holes in wall and water damage to window sill	\$203.23
2	Utilities	\$38.25
3	Liquidated Damages	\$450.00
4	October rent	\$700.00
5	Filing fee	\$100.00
	TOTAL	\$1,491.48

The Landlord can keep the \$700.00 security deposit pursuant to section 72(2) of the *Act*. The Landlord is issued a monetary order for the remaining \$791.48 pursuant to section 67 of the *Act*.

Conclusion

The Landlord is entitled to \$1,491.48. The Landlord can keep the security deposit. The Landlord is issued a monetary order for the remaining \$791.48. This Order must be served on the Tenants. If the Tenants fail 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 19, 2020

Residential Tenancy Branch