



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

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

Introduction

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

- a Monetary Order for unpaid rent, pursuant to sections 26 and 67;
- a Monetary Order for damage or compensation, pursuant to section 67;
- a Monetary Order for damage, pursuant to section 67;
- authorization to retain the tenant's security and pet damage deposits, pursuant to section 38; and
- authorization to recover the filing fee from the tenant, pursuant to section 72.

Both parties attended the hearing and were each given a full opportunity to be heard, to present affirmed testimony, to make submissions, and to call witnesses. The tenant's support person also attended the hearing.

Both parties agree that the tenant was served with the landlord's application for dispute resolution via registered mail. I find that the tenant was served with the landlord's application for dispute resolution in accordance with section 89 of the *Act*.

Issues to be Decided

1. Is the landlord entitled to a Monetary Order for unpaid rent, pursuant to sections 26 and 67 of the *Act*?
2. Is the landlord entitled to a Monetary Order for damage or compensation, pursuant to section 67 of the *Act*?
3. Is the landlord entitled to a Monetary Order for damage, pursuant to section 67 of the *Act*?
4. Is the landlord entitled to retain the tenant's security and pet damage deposits, pursuant to section 38 of the *Act*?

5. Is the landlord entitled to recover the filing fee from the tenant, pursuant to section 72 of the *Act*?

Background and Evidence

While I have turned my mind to the documentary evidence and the testimony of both parties, not all details of their respective submissions and arguments are reproduced here. The relevant and important aspects of the tenant's and landlord's claims and my findings are set out below.

Both parties agreed to the following facts. This tenancy began on May 26, 2019 and ended on October 20, 2019. This was originally a fixed term tenancy set to end on May 31, 2020. Monthly rent in the amount of \$2,000.00 was payable on the first day of each month. A security deposit of \$1,000.00 and a pet damage deposit of \$1,000.00 were paid by the tenant to the landlord. A written tenancy agreement was signed by both parties and a copy was submitted for this application. The tenant texted the landlord on September 30, 2019 and informed the landlord that she was moving out of the subject rental property at the end of October 2019.

The landlord testified to the following facts. On October 1, 2019 she posted advertisements of the subject rental property on several websites at the same rental rate as that paid by the tenant. Copies of the advertisements were entered into evidence. The subject rental property did not generate significant interest and the landlord had to drop the monthly rental rate to secure a new tenant for November 1, 2019. A new tenant moved in November 1, 2019 and paid a rental rate of \$1,850.00. The new tenancy agreement was entered into evidence. The landlord applied for dispute resolution on October 25, 2019.

The landlord testified that she is seeking the difference between what she would have earned under the tenant's tenancy agreement and what she will earn from the new tenant under the new tenancy agreement, for a total of \$1,200.00.

The tenant testified that since she paid October 2019's rent in full, the landlord's claim for loss of rental income should only be for seven months, November 2019 to May 2020, totaling \$1,050.00. The landlord did not dispute the tenant's testimony that October 2019's rent was paid in full.

The landlord testified that she is seeking to recover liquidated damages from the tenant in the amount of \$2,000.00.

Section 18 of the addendum to the tenancy agreement states:

Liquidated damages: If Tenant ends the fixed term tenancy before the original term as set out in the tenancy agreement, the Landlord may treat this agreement as being at an end. In such an event, an equivalent of one month's rent will be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the Landlords cost of re-renting the Premises and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent for damage to the rental property.

I asked the landlord how the liquidated damage sum of \$2,000.00 was calculated. The landlord testified that it was based on one month's rent.

The tenant testified that she did not read this clause before signing the tenancy agreement and the addendum.

Both parties agreed that the tenant gouged the wall in the bedroom and scuffed the wall in the closet. The landlord entered into evidence an email quote in the amount of \$200.00 to repair the gouge and the scuff. The landlord testified that the subject rental property was last painted just before the tenant moved in.

Analysis

Loss of Rental Income

Under section 7 of the *Act* a landlord or tenant who does not comply with the Act, the regulations or their tenancy agreement must compensate the affected party for the resulting damage or loss; and the party who claims compensation must do whatever is reasonable to minimize the damage or loss.

Pursuant to Policy Guideline 16, damage or loss is not limited to physical property only, but also includes less tangible impacts such as loss of rental income that was to be received under a tenancy agreement.

Policy Guideline 5 states that where the landlord or tenant breaches a term of the tenancy agreement or the Residential Tenancy Act or the Manufactured Home Park Tenancy Act (the Legislation), the party claiming damages has a legal obligation to do whatever is reasonable to minimize the damage or loss. This duty is commonly known

in the law as the duty to mitigate. This means that the victim of the breach must take reasonable steps to keep the loss as low as reasonably possible. The applicant will not be entitled to recover compensation for loss that could reasonably have been avoided. The duty to minimize the loss generally begins when the person entitled to claim damages becomes aware that damages are occurring.

Efforts to minimize the loss must be "reasonable" in the circumstances. What is reasonable may vary depending on such factors as where the rental unit or site is located and the nature of the rental unit or site. The party who suffers the loss need not do everything possible to minimize the loss, or incur excessive costs in the process of mitigation.

Policy Guideline 3 states that the damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy.

In this case, the tenant ended a one-year fixed term tenancy early; thereby decreasing the rental income that the landlord was to receive under the tenancy agreement for the months of November 2019 to May 2020. Pursuant to section 7, the tenant is required to compensate the landlord for that loss of rental income. However, the landlord also has a duty to minimize that loss of rental income by re-renting the unit at a reasonably economic rate as soon as possible. I find that the landlord mitigated her losses by posting advertisements for the subject rental property at the same rental rate as that paid by the tenant, two days after the tenant advised the landlord via text that she intended on breaking the fixed term lease.

Pursuant to section 7 of *Act* and Policy Guideline 3, I find that the tenant owes the landlord the difference between the rent owed under the tenancy agreement (\$2,000.00) and the rent which will be collected by the landlord under the new tenancy agreement (\$1,850.00) for the months of November 2019 to May 2020 (the end of the fixed term of the tenancy). $\$2,000.00 - \$1,850.00 = \$150.00$. Seven months at \$150.00 per month equals **\$1,050.00**.

Liquidated Damages

Policy Guideline #4 states that 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.

In this case, I find that the tenant signed the tenancy agreement and the addendum to the tenancy agreement and that the tenant is liable to pay liquidated damages for causing the tenancy to end prematurely. I find that the liquidated damages clause was clearly and carefully laid out in the addendum and detailed the consequences of breaking the fixed term tenancy agreement to the parties. It was the tenant's responsibility to read the tenancy agreement and the addendum before she signed it. Ignorance is not a contractual defense.

I find that the amount one month's rent stipulated to cover the administration costs that the landlord would have likely incurred at the time the tenancy agreement was entered into is reasonable and not extravagant or exorbitant in relation to the rent payable in this tenancy.

While the landlord was not able to specify precisely how the liquidated damage fee was calculated, there is insufficient evidence before me that the costs themselves are not genuine. In addition, I find that tenant failed to provide any evidence to show that the costs stated by the landlord were not a genuine pre-estimate of their losses or that they were a penalty. I find that the tenant is liable to pay liquidated damages in the amount of \$2,000.00.

Monetary Claim

Policy Guideline 16 states that 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.

Section 32(3) of the *Act* states that a tenant of a rental unit must repair damage to the rental unit or common areas that is caused by the actions or neglect of the tenant or a person permitted on the residential property by the tenant.

Section 32(4) of the *Act* states that a tenant is not required to make repairs for reasonable wear and tear.

Residential Tenancy Policy Guideline #1 states that reasonable wear and tear refers to natural deterioration that occurs due to aging and other natural forces, where the tenant has used the premises in a reasonable fashion.

I find that a gouge to drywall is not the result of natural deterioration, aging or other natural forces, and so does not meet the definition of reasonable wear and tear.

Policy Guideline #1 states that the tenant is responsible for washing scuff marks, finger prints, etc. off the walls unless the texture of the wall prohibited wiping. I find that pursuant to section 32(3) of the *Act* and Policy Guideline #1, the tenant was responsible for removing scuff marks from the wall at the end of the tenancy and that she did not do so.

I find that the tenant damaged the subject rental property and did not repair that damage in accordance with section 32 of the *Act*. I find that the landlord has suffered a loss for the repair of the walls. I find that the landlord acted reasonably in obtaining a quote to repair the wall.

Policy Guideline #40 states that the useful life for interior painting is four years (48 months). Therefore, at the time the tenant moved out, there was approximately 43 months of useful life that should have been left for the interior paint of this unit. I find that since the wall required repainting and repair after only 5 months, the tenant is required to pay according to the following calculations:

$\$200.00$ (cost of painting) / 48 months (useful life of paint) = $\$4.17$ (monthly cost)

$\$4.17$ (monthly cost) * 43 months (expected useful life of paint after tenant moved out) = **\$179.31**

Security Deposit

Section 38 of the *Act* states that within 15 days after the later of:

- (a) the date the tenancy ends, and
 - (b) the date the landlord receives the tenant's forwarding address in writing,
- the landlord must do one of the following:
- (c) repay, as provided in subsection (8), any security deposit or pet damage deposit to the tenant with interest calculated in accordance with the regulations;
 - (d) make an application for dispute resolution claiming against the security deposit or pet damage deposit.

I find that the landlord made an application for dispute resolution claiming against the security and pet damage deposits pursuant to section 38(a) and 38(b) of the *Act*.

Section 72(2) of the *Act* states that if the director orders a tenant to make a payment to the landlord, the amount may be deducted from any security deposit or pet damage deposit due to the tenant. I find that the landlord is entitled to retain the tenant's security and pet damage deposits totaling \$2,000.00, in part satisfaction of the monetary claim.

Conclusion

I issue a Monetary Order to the landlord under the following terms:

Item	Amount
Loss of rental income	\$1,050.00
Liquidated damages	\$2,000.00
Wall repair	\$179.31
Filing Fee	\$100.00
Less security and pet damage deposits	-\$2,000.00
TOTAL	\$1,329.31

The landlord is provided with this Order in the above terms and the tenant must be served with this Order as soon as possible. Should the tenant 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: March 18, 2020

Residential Tenancy Branch