



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL, MNDCL, MNDL, FFL

Introduction

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

- authorization to retain all or a portion of the tenant's security deposit in partial satisfaction of the monetary order requested pursuant to section 38;
- a monetary order for unpaid rent, for damage to the rental unit, and for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement in the amount of \$3,300 pursuant to section 67; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

The tenant did not attend this hearing, although I left the teleconference hearing connection open until 2:04 pm in order to enable the tenant to call into this teleconference hearing scheduled for 1:30 pm. The landlord attended the hearing and was given a full opportunity to be heard, to present affirmed testimony, to make submissions and to call witnesses. I confirmed that the correct call-in numbers and participant codes had been provided in the Notice of Hearing. I also confirmed from the teleconference system that the landlord and I were the only ones who had called into this teleconference.

Preliminary Issue - Service

The landlord testified that the tenant did not provide him with a forwarding address when he moved out of the rental unit. The landlord testified that the tenant had provided him with his parent's mailing address and phone number during the tenancy. The landlord called the tenant's parent's phone number and asked to speak to the tenant. He testified that the tenant's parents told him the tenant was not in at the moment.

The landlord testified he mailed the notice of dispute resolution form and supporting evidence package via registered mail to the tenant's parent's address on September 18, 2020. He provided a Canada Post tracking number (reproduced on the cover of this decision) confirming the mailing. The Canada Post tracking number indicates that the package was delivered on September 23, 2020.

Section 89 of the Act permits documents to be served on a party by sending them via registered mail to an address at which they reside. I find that the tenant's parent's

response to the landlord's request to speak to the tenant that "the tenant was not in at the moment" indicates that the tenant resides at the parent's home.

In the event that I am incorrect, and the tenant does not reside at his parent's home, I find that, per section 71(2)(c) of the Act, the tenant is sufficiently served with the required documents, as the documents would reasonably have been brought to the tenant's attention by his parents.

As such, I proceeded the hearing in the tenant's absence.

Issues to be Decided

Is the landlord entitled to:

- 1) a monetary order for \$3,300; and
- 2) recover the filing fee?

Background and Evidence

While I have considered the documentary evidence and the testimony of the landlord, not all details of his submissions and arguments are reproduced here. The relevant and important aspects of the landlord's claims and my findings are set out below.

The parties entered into a written, fixed term tenancy agreement starting September 1, 2018 and ending on August 31, 2019. The parties entered into a second fixed term tenancy on September 1, 2019 ending August 31, 2020. Monthly rent is \$1,800 and is payable on the first of each month. The landlord did not complete either a move-in or a move-out condition inspection report. The tenant paid the landlord a security deposit of \$900. The landlord testified that, prior to vacating the rental unit, the tenant told him he should use the security deposit to pay for rent owing from March 1 to March 14, 2020.

The tenancy agreement is not in the standard RTB form, and contains the following clauses upon which the landlord bases portions of his application:

- 1) The tenant will be charged an additional amount of \$25.00 for each NSF cheque or cheques returned by the tenant's financial institution.
- 2) If the tenant moves out prior to the natural expiration of this lease, a re-rent levy of \$1,800.00 will be charged to the tenant.

The tenant notified the landlord on February 27, 2020 that he intended to vacate the rental unit as of March 14, 2020. The landlord testified that the tenant cancelled his March 2020 rent cheque and that the landlord did not realize this until after he tried to cash it.

The landlord testified that, upon learning of the tenant's intention to vacate, he advertised the rental unit on Kijiji and Craigslist and secured a new tenant for April 1,

2020. He testified that he did not incur any expenses (such as agent fees, the cost of credit checks, or advertising costs) when securing a new tenant.

The landlord testified that the rental unit was new at the start of the tenancy, and that, for the most part, rental unit was in good condition at the end of the tenancy. However, he testified that the tenant wallpapered one wall in the dining room and that the tenant mounted a TV to a different wall and cut holes in the wall to hid the cables. The landlord testified that he incurred \$550 in costs hiring a contractor to repair these damages. He did not submit any photographs of the damage or invoices or quote relating to the cost of repairing the alleged damage.

The landlord seeks a monetary order of \$3,275 calculated as follows:

Wall repair	\$550
March 2020 rent	\$1,800
Returned cheques fee	\$25
Re-rent levy (per the tenancy agreement)	\$1,800
Security deposit credit towards March 2020 rent	-\$900
Total	\$3,275

The landlord acknowledged that he miscalculated the amount of his claim by \$25 on his application.

Analysis

Residential Tenancy Policy Guideline 16 sets out the criteria which are to be applied when determining whether compensation for a breach of the Act is due. It states:

The purpose of compensation is to put the person who suffered the damage or loss in the same position as if the damage or loss had not occurred. 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.

(the “**Four-Part Test**”)

Rule of Procedure 6.6 states:

6.6 The standard of proof and onus of proof

The standard of proof in a dispute resolution hearing is on a balance of probabilities, which means that it is more likely than not that the facts occurred as claimed.

The onus to prove their case is on the person making the claim. In most circumstances this is the person making the application.

So, the landlord must prove it is more likely than not that the tenant has breached the Act or tenancy agreement as alleged, that he has suffered quantifiable damages, and that he has acted reasonably to minimize them.

I will address each of the bases of the landlord's monetary claim in turn.

1. Wall Damage

Section 32 of the Act states:

Landlord and tenant obligations to repair and maintain

(2) A tenant must maintain reasonable health, cleanliness and sanitary standards throughout the rental unit and the other residential property to which the tenant has access.

(3) 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.

(4) A tenant is not required to make repairs for reasonable wear and tear.

These obligations are reiterated at section 37(2) of the Act, which states:

Leaving the rental unit at the end of a tenancy

(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

The landlord alleges that the tenant breached these sections of the Act by cutting holes in one wall and by wallpapering another. However, the landlord failed to complete a move-in inspection report at the start of the tenancy, as required by section 23 of the Act. As such, I cannot say what the condition of the rental was when the tenant moved in. Additionally, the landlord has not provided any documents corroborating his testimony that the tenant damaged the rental unit, or that he incurred \$550 in costs repairing that damage. I would have expected photographs of the alleged damage and a copy of the invoice for repairs to have been entered into evidence. As such, I find that the landlord has failed to discharge his evidentiary burden to prove that the tenant damaged the rental unit during the tenancy, that the landlord incurred \$550 in costs

repairing that damage, and that, if he did incur these costs, that the costs incurred were reasonable.

As such, I decline to award the landlord any amount for this portion of his claim.

2. March Rent and Returned Cheques Fee

Section 7 of the *Residential Tenancy Regulation* (the “**Regulation**”) states:

Non-refundable fees charged by landlord

7(1) A landlord may charge any of the following non-refundable fees:

[...]

(d) subject to subsection (2), an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent;

Section 26(1) of the Act states:

Rules about payment and non-payment of rent

26(1) A tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent.

Per the tenancy agreement, rent is due on the first of each month. As such, the tenant was obligated to pay \$1,800 in rent on March 1, 2020. He did not do this.

I note that Section 45 of the Act sets out how a tenant may give notice to end a fixed term tenancy. It 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.

The tenant did none of these. As such, he was not entitled to end the tenancy as of March 14, 2020, and he is obligated to pay rent for the entire month of March 2020, even though he vacated the rental unit prior to the end of the month.

As such, I order the tenant to pay the landlord \$1,800, representing unpaid rent for March 2020.

I accept the landlord's testimony that the tenant cancelled the March rent cheque, that he did not advise the landlord of this, and that the landlord unsuccessfully attempted to cash the cheque and it was returned to him. As such, I find that, per the tenancy agreement and section 7 of the Regulation, that the landlord is entitled to charge the tenant a \$25 returned cheque fee.

3. Re-rent Levy

This portion of the landlord's claim is not based in damage or loss suffered as a result of the tenant's breach of the Act, but rather is based on a clause in the tenancy agreement whereby the tenant is obligated to pay an amount to landlord if he "moves out prior to the natural expiration of this lease" (that is, prior to August 31, 2020).

Policy Guideline 4 addresses such clauses. It states:

This guideline deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of 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.

While not labelled as such in the tenancy agreement, the clause containing the "re-rent levy" is arguably a liquidated damages clause. If it is not, it would be considered a "penalty" clause, and be unenforceable.

The amount of the "re-rent levy" is equal to one month's rent. The landlord did not testify as to how he arrived at this amount, or as to what costs this amount was meant to compensate the landlord for.

The landlord testified that he did not incur any costs associated with the tenant's early departure from the rental unit, aside from his own time spent. As such, I am unsure what costs, if any, the landlord contemplated this "levy" would compensate him for when he included it in the tenancy agreement.

I should note that liquidated damages clauses are most common when the rental unit is managed by a professional company who is also responsible for securing new tenants for the rental unit. The fee charged to the owner of the rental unit for securing a new tenant is usually set a half month or one month's rent (depending on the amount of

rent), and the liquidated damages clause is included in the tenancy agreement to compensate for this cost.

I find that the “re-rent levy” is not a genuine pre-estimate of loss caused to the landlord by the tenant’s breach of the tenancy agreement. It is a penalty clause and is not enforceable.

As such, I decline to award the landlord any amount for this portion of his claim.

4. Security Deposit and Filing Fee

Pursuant to section 72(1) of the Act, as the landlord has been partially successful in the application, he may recover the filing fee (\$100) from the tenant.

Pursuant to section 72(2) of the Act, the landlord may retain the security deposit (\$900) in partial satisfaction of the monetary orders made above.

Conclusion

Pursuant to sections 67, and 72 of the Act, I order that the tenant pay the landlord \$1,025, representing the following:

March Rent	\$1,800
Returned cheque fee	\$25
Filing fee	\$100
Security deposit credit	-\$900
Total	\$1,025

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 23, 2020

Residential Tenancy Branch