Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on June 23, 2020, November 3, 2020, and February 2, 2021. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "*Act*").

The Tenant attended all hearings with her counsel (collectively referred to as the Tenant). The Landlord also attended the hearing, along with her counsel, and her agent (collectively referred to as the Landlord).

At the first hearing, the Landlord confirmed receipt of the Tenant's application and Notice of Hearing, but the Tenant had a medical issue which made it difficult to submit her evidence. Given this, the parties agreed to an adjournment to allow the Tenant time to submit her evidence. Also, at the first hearing, the Tenant confirmed she received the Landlord's evidence.

At the second hearing, the Landlord confirmed receipt of the Tenant's recently submitted evidence and the Landlord confirmed she wanted to rely on her initial evidence package, which the Tenant confirmed she had at the first hearing. Neither party raised any issue with respect to service of the documents, and both parties were willing and able to proceed with the application and all evidence.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Issues to be Decided

- Is the Landlord entitled to a monetary order for damage or loss under the Act?
- Is the Landlord entitled to retain all or a portion of the Tenant's security and pet deposit in partial satisfaction of the monetary order requested?
- Is the Landlord entitled to recover the cost of the filing fee?

Background and Evidence

As per the tenancy agreement provided into evidence, monthly rent was set at $8,975.00 per month, due on the first of the month. The Tenant paid a security deposit and a pet deposit, totalling $8,975.00. The tenancy agreement was signed on June 12, 2018, (addendum signed on June 13, 2018) and was set to start on July 1, 2018 for a fixed term of 1-year, ending on June 30, 2019. The Tenant paid $8,975.00 for her first month's rent along with her security and pet deposit. The Tenant never moved in, and the Landlord is now seeking damages as a result of this breach of the tenancy agreement.

The Landlord stated that the Tenant came and viewed the property on June 7, 2018, and applied to rent the property on June 8, 2020, as per the email provided into evidence from the Landlord. Since there was an active tenancy in the unit at that time, those tenants had not cleaned up, a few areas needed painting and cleaning, the yard needed some maintenance, and the hot tub needed to be cleaned.

As per the email from the Landlord dated June 12, 2018, the Tenant came to sign the tenancy agreement and pay the deposits that day. The Landlord signed the tenancy agreement shortly following this.

The agent for the Landlord attended the hearing and stated that when he met with the Tenant to sign the lease and go over the documentation on June 12 and 13, the Tenant did not present with any impairments, or issues, and he had no reason to question her abilities or intentions to rent the premises. The agent for the Landlord stated that the Tenant tried to reach out to him, by phone on June 15 and 16, and he eventually got back to her on June 16, 2018, at which point the Tenant informed him of her intention to not move in.

The Tenant also stated that she sent an email to the Landlord on June 15, 2018, informing the Landlord's agent of her intentions to not move in. The Tenant provided a copy of an email whereby the Landlord's agent acknowledged her intention to back out

of the lease on June 18, 2018, and the Tenant was asked to fill out a formal breach of lease document. The Tenant stated that she filled out the breach of lease document, as requested, and returned this document to the Landlord on June 30, 2018.

The Tenant stated in the hearing that after discussing the matter with her son the day following her signing of the tenancy agreement, and after further considering the rental agreement she had signed, she realized she had made an error in judgement by committing to a 1 year lease. Although the Tenant noted there were some cleanliness and minor repair issues, she confirmed that the main reason she decided to back out of the lease was because of her health conditions. The Tenant stated that, after she signed the lease (around June 13, 2018), paid the deposits and first months rent, she decided a matter of days later (on June 15, 2018) that she should not move in. The Tenant does not feel she should be liable for all the Landlord's damages.

Summary of Landlord's application – amounts

The Landlord explained that the Tenant paid July 2018 rent ($8,975.00), along with 150 towards the utilities, plus the security and pet deposit (totalling $8,975.00). The Landlord stated they were unable to re-rent the unit until January 1, 2019 (at a reduced rate of $5,850.00). The Landlord stated she incurred a rental loss due to having the rental unit empty for July through till the end of December 2018. Since July was already paid by the Tenant at the time she signed the lease, she lost out on $8,975.00 x 5 for August – December 2018, which is the time the rental unit sat empty, and without revenue. On top of this amount, the Landlord stated she had to lower the rent to attract new tenants, due to a shift in the market, which means she also suffered a loss of $3,125.00 x 6 months for January 2019 through till June 2019. The Landlord stated that this is the difference between what the unit re-rented for, and what she would have got, had the tenant fulfilled her obligations under the tenancy agreement.

The Landlord specified that she also suffered a loss because she had to pay her agent 50% of one month's rent as a fee to find new tenants, which is why she is seeking liquidated damages of $4,487.50, as laid out in the tenancy agreement.

The Landlord summarized all the above losses as $68,112.50. However, the Landlord was aware that the Act does not allow amounts in excess of $35,000.00 to be sought, so she reduced her claim to that amount, rather than proceed to the Supreme Court for the full amount.

In summary, rather than ask for the full amount of her losses summarized above, the Landlord is seeking the following two items as laid out in her submission:

1) Liquidated damages - $4,487.50
2) Lost Rent - $30,512.50 (reduced to fit within the $35,000.00 claim limit)

With respect to the liquidated damages clause, the Landlord pointed to the tenancy agreement, to show that the Landlord and the Tenant agreed to a liquidated damages clause (term #6) whereby the Tenant would pay $4,487.50 if the lease was broken. The Landlord stated that this was a genuine pre-estimate of the costs to re-rent, since her agent charges 50% of one month's rent as a fee to re-rent the unit. This clause also stipulates that the Landlord is not precluded from seeking other damages such as rental losses. The Landlord pointed out that the Tenant specifically initialled this clause (#6), as per the tenancy agreement.

The Tenant stated that she was initially willing to pay the liquidated damages clause, and she provided a cheque to the Landlord for this amount, shortly after she said she would not be moving in. However, the Tenant stated that the Landlord never actually cashed that cheque, and now appears to be seeking much more than just the liquidated damages amount. The Tenant feels the Landlord's claims against her are for an excessive amount.

With respect to the issue of lost rent, the Landlord stated that she had the unit rented right up until the end of June 2018 for $8,975.00 (leading up to the start of this tenancy agreement). This is the same amount the Tenant agreed to pay when she signed the lease in mid-June, and this is the amount the Landlord attempted to re-rent/re-list it for when the unit was put back on the market around June 22, 2018, after the Landlord knew the Tenant would not be moving in.

The Landlord provided the following account of price reductions for the rental property:

- June 22, 2018 – Landlord relisted property at the same price, $8,975.00
- July 4, 2018 – Landlord reduced price to $8,500.00
- August 14, 2018 – Landlord reduced price to $8,200.00
- September 23, 2018 – Landlord reduced price to $7,500.00
- October 19, 2018 – Landlord reduced price to $6,950.00
- October 30, 2018 – Landlord reduced price to $6,500.00

The Landlord provided the following details with respect to showings and inquiries on the rental property:

- June 2018 – no viewings to prospective tenants
- July 2018 – 5 viewings by prospective tenants
- August 2018 – 1 viewing by a prospective tenant
- September 2018 – 1 viewing by a prospective tenant
- October 2018 – 2 viewings by prospective tenants
- November 2018 – 1 viewing by the tenant who ended up moving in on January 1, 2019. This agreement was signed on December 3, 2018, for a monthly rent amount of $5,850.00.

The Landlord explained that she did everything she could to re-rent the unit, but the rental market softened substantially after June/July of 2018. The Landlord stated that they did their best to mitigate their losses. The Landlord acknowledged that there were a few minor things that needed to be freshened up in and around the rental unit prior to re-renting it (minor repainting, deck staining, hot tub cleaning, power-washing etc). However, she stated that this was all done in July and August of 2018, while they were actively trying to show it and mitigate the losses.

The Tenant explained that she has Parkinson's disease and has acute amnesia, at times. The Tenant explained that she has known about her some of her neurological issues since the spring of 2017. The Tenant explained that she has ongoing memory and cognitive issues, and has severe impairment of visual cognition. The Tenant provided a copy of a medical report, from around September of 2018, whereby she was described as having atypical Parkinson's disease and cognitive deficits (significant cognitive impairment, and short-term memory loss).

The Tenant also provided a copy of a letter from her Doctor, dated October 30, 2020, which states that the Tenant has been under her care since 2016, for Parkinson's Disease. Additionally, the note indicates the Tenant experienced acute amnesia in the spring of 2017. The Tenant was also diagnosed with Sjogren syndrome in late 2017. The Tenant's doctor noted that formal neurological testing was conducted on the Tenant on June 19, 2018, and June 27, 2018, which demonstrated severe impairment of visual and verbal memory, and some mild cognitive impairment.

The Tenant reiterated that her main reason for backing out of the tenancy agreement was because she was concerned for her health, and after thinking things through following the signing of her agreement, and after discussing with her son, she decided

to break the lease before moving in. The Tenant attempted to explain the dates she viewed the property, and the dates she signed the agreement, but gave an inconsistent and unreliable account. The Tenant stated she first attended the property on June 14, 2018, and brought her son with her on June 16, 2018, but later stated that she signed the tenancy agreement on June 13, 2018, after viewing the property. The Tenant specifically noted that she was "confused" about the dates she mentioned, as her memory is not very good.

The Tenant noted that after she signed the lease, she returned to the property with her son on June 14, 2018, and her son encouraged her to think twice about moving in, since there were stairs, and the fact it was such a big commitment, given her health conditions. The Tenant stated that she reached out to the Landlord shortly thereafter, and started discussing backing out of the agreement.

Tenant's Legal Arguments

1) The Tenant's counsel stated that the Landlord's claim for prospective rent contravenes section 22 of the Act and is not enforceable, since the Act prohibits the inclusion of acceleration clauses in tenancy agreements. Counsel argued that the Tenant delivered her notice to end tenancy in accordance with what was required under the tenancy agreement and the Landlord accepted this notice when the liquidated damages clause was sought. The Tenant took the position that she was not under a fixed term agreement and that her obligations stopped once she provided her Notice of Breach of Lease. Counsel suggested that the Tenants obligations should not go beyond the liquidated damages clause.

2) The Tenant's counsel argued that the premises were not adequate for renting, and that the Landlord agreed to a number of repairs prior to her taking possession. The Tenant's counsel argued that the lease could not have gone ahead because of the state of repair of the unit. However, the Tenant somewhat contradicted this argument when she indicated that it was because of her health that she backed out of the agreement. The Tenant noted that she signalled to the Landlord that she wanted to back out of the lease only a couple of days after she signed the lease.

3) The Tenant's counsel stated that the lease was 'unconscionable', as per the test laid out in *Norberg v Wynrib SCC.* The Tenant's counsel argued that the Tenant was dealing with a mental health crisis and another eviction at the time she entered into

the lease, which created an imbalance of power. Counsel also argued that the lease was “grossly unfair”, as it was substantially overpriced.

4) The Tenant’s counsel also argued that the lease was frustrated. More specifically, counsel argued that the lease was frustrated when the Tenant learned of her medical diagnosis, and it was no longer suitable for her to be living alone or with open stairs.

5) The Tenant asked for double her security deposit because the Landlord failed to return the deposits within 15 days. The Tenant did not file an application for monetary compensation or for double the security deposit as a penalty, nor did she provide any evidence that she provided her forwarding address in writing to the Landlord.

   The Tenant is seeking the return of her $150.00 utility payment for July 2018, as she never moved in.

6) The Tenant’s counsel argued that the Landlord did not take reasonable steps to mitigate her loss, since she failed to appropriately price the unit, and failed to fix the deficiencies (gardening, hot tub, cleaning, deck staining).

Landlord’s response to Tenant’s Legal Arguments (in same order as Tenant’s legal arguments above)

1) The Landlord’s counsel argued that they should not be barred from collecting the liquidated damages sum, or the amount of rent they lost due to the Tenant’s breach of contract. The Landlord’s counsel argued that section 22 of the Act does not preclude them from applying for these amounts. The Landlord’s counsel argued that the liquidated damages clause is clearly just that, a pre-estimate of the costs to re-rent. This is not the same as an acceleration clause, or for the rental losses that were incurred after the Tenant’s breach of the lease.

2) The Landlord’s counsel argued that there is no merit to the Tenant’s claim that the unit had deficiencies which made the property un-rentable. Counsel argued that none of the deficiencies were material such that it was grounds for ending the lease.

3) The Landlord's counsel argued that the lease was not "unconscionable" such that the whole tenancy agreement is unenforceable. Counsel argued that there is a 4 part test which must be met in order for something to be found to be unconscionable. Notably, counsel stated that it was never grossly unfair, as rent was the same as what it was for the previous tenant. Further, there is no evidence that the Landlord was aware of the Tenant's medical issues, and sought to take advantage of these issues or to exploit her for an unreasonable amount of rent.

4) The Landlord's counsel argued that the tenancy agreement was not "frustrated" since there was no "unforeseeable event", as laid out in Policy Guideline #34. Counsel argued that the Tenant knew of her medical issues well in advance of signing the lease, and ought to have brought someone with her to assist her, if required.

5) The Landlord's counsel argued that they never received the Tenant's forwarding address in writing, so the deposits should not be doubled. Further, the Tenant never made an application for compensation.

6) The Landlord's counsel argued that they took many steps to mitigate, as outlined above, and did the best they could to re-rent the unit at a reasonable economic rent, and in a timely manner. The Landlord stated that, even though none of the Tenant's concerns about the rental unit (hot tub cleanliness, deck, pressure washing, gardening etc) were significant, she took steps over the month of July and August to have the issues fixed (repainting, exterior work). The Landlord stated that she also continually lowered the price but the market had softened for high end rentals.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act,* regulation, or tenancy agreement on the part of the Tenant. Once that has been established, the Landlord must then provide evidence that can verify the value of the loss or

damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

First, I will address some of the legal arguments raised by the Tenant and her counsel in response to the Landlord's claim.

With respect to the first argument raised by the Tenant's counsel, I do not find the Landlord has contravened section 22 of the Act. Section 22 of the Act states as follows:

> ***Acceleration term prohibited***
> ***22*** *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 acknowledge that there is a liquidated damages clause. However, I do not find that the liquidated damages clause equates to a term that requires all or part of rent be paid upon breach of the agreement. That clause is allowable under the Act, and the Policy Guidelines, and is typically used to help Landlord's recover the costs associated with re-renting the unit. Further, I also do not accept that the Landlord violated section 22 of the Act by seeking "prospective" lost rent due to the breach of the fixed term agreement.

I note the Tenant's counsel has suggested that the tenancy agreement was periodic. However, the tenancy agreement, signed by the Tenant clearly indicates that this was a fixed term tenancy agreement, spanning from July 1, 2018, until June 30, 2019. The Tenant was not in a position to legally end the tenancy with one month's notice, prior to the end of the fixed term (without financial liability). I do not find the Notice of Breach of Lease absolves the Tenant from liability. I do not accept the argument that the Landlord's claim for rental loss over the period of the fixed term violates section 22 of the Act.

Under section 7 of the *Act*, if a landlord or tenant does not comply with the Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for resulting damage or loss. As such, the Landlord is entitled to file a claim for lost rent due to breach of the fixed term tenancy agreement. This will be further addressed below.

With respect to the second argument made by the Tenant's counsel, I note she argued that the premises were not adequate for renting, and were not as promised, and that the Landlord agreed to a number of repairs prior to her taking possession. I have

considered this argument, but I note the Tenant specifically stated that she backed out of the tenancy agreement largely because of her health conditions. Further, the Tenant appears to have backed out prior to the possession date, and did not actually provide a full opportunity for the issues to be remedied in a reasonable time frame. I reject the argument that the rental unit was not adequate for renting.

With respect to the third argument made by the Tenant's counsel, I do not find there is sufficient evidence to show the lease was unconscionable.

Policy Guideline #8 states the following:

> ***Unconscionable Terms***
>
> *Under the Residential Tenancy Act and the Manufactured Home Park Tenancy Act, a term of a tenancy agreement is unconscionable if the term is oppressive or grossly unfair to one party.*
>
> *Terms that are unconscionable are not enforceable[1]. Whether a term is unconscionable depends upon a variety of factors.*
>
> *A test for determining unconscionability is whether the term is so one-sided as to oppress or unfairly surprise the other party. Such a term may be a clause limiting damages or granting a procedural advantage. Exploiting the age, infirmity or mental weakness of a party may be important factors. A term may be found to be unconscionable when one party took advantage of the ignorance, need or distress of a weaker party.*
>
> *The burden of proving a term is unconscionable is upon the party alleging unconscionability.*

There is insufficient evidence that the monthly rent amount was grossly unfair, as it was the same amount that it was rented for before. Further, there is no evidence to show the Landlord knew about the Tenant's medical issues, or that she knowingly took advantage of the Tenant's vulnerability. Ultimately, I am not satisfied that the lease was unconscionable for any of the reasons presented.

With respect to the fourth argument made by the Tenant's counsel, I do not accept that the lease was "frustrated" when the Tenant learned of her medical diagnosis. There is insufficient evidence showing she became aware of any new medical issues between when she signed the tenancy agreement on or around June 13, 2018, and two days later when she verbally informed the Landlord she wanted to back out of the lease. It

appears that the majority of the Tenant's medical issues were present long prior to her agreeing to rent the premises. Furthermore, even if the Tenant did find out about some new medical issues between when she signed the lease, and when she backed out of the lease, there is insufficient evidence to show that these issues were such that the tenancy agreement was radically changed or that the fulfillment of the terms were impossible.

Policy Guideline #34 – Frustration - speaks to this issue as follows:

> *A contract is frustrated where, without the fault of either party, a contract becomes incapable of being performed because an unforeseeable event has so radically changed the circumstances that fulfillment of the contract as originally intended is now impossible. Where a contract is frustrated, the parties to the contract are discharged or relieved from fulfilling their obligations under the contract.*
>
> *The test for determining that a contract has been frustrated is a high one. The change in circumstances must totally affect the nature, meaning, purpose, effect and consequences of the contract so far as either or both of the parties are concerned. Mere hardship, economic or otherwise, is not sufficient grounds for finding a contract to have been frustrated so long as the contract could still be fulfilled according to its terms.*
>
> *A contract is not frustrated if what occurred was within the contemplation of the parties at the time the contract was entered into. A party cannot argue that a contract has been frustrated if the frustration is the result of their own deliberate or negligent act or omission.*

With respect to the Tenant's counsels fifth argument, I note the Tenant failed to file her own application for monetary compensation, so her claim for the return of $150.00 for utilities is dismissed. Further, there is no evidence that the Tenant provided her forwarding address to the Landlord, in writing, or that the Landlord extinguished her right to claim against the deposit. Also, the Tenant failed to file an application for monetary compensation asking for double the deposit. I dismiss and reject the Landlord's counsel's requests and arguments on this matter.

With respect to the Tenant's counsels sixth argument, that the Landlord did not sufficiently mitigate her rental loss, I will address this matter further below.

The Landlord is seeking the monetary claim limit of $35,000.00 for two main items, as follows:

1) Liquidated damages - $4,487.50
2) Lost Rent - $30,512.50 (reduced to fit within the $35,000.00 claim limit)

Regarding the first item, which is the liquidated damages clause sought by the Landlord, I note the tenancy agreement specifically includes a term, that was initialled by the Tenant, which specifies that the above noted sum is payable in the event the tenancy agreement is breached.

Residential Tenancy Policy Guideline 4 provides for 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 fixed term by the Tenant. If a liquidated damages clause is determined to be valid, the Tenant must pay the stipulated sum unless the sum is found to be a penalty. I find the amount payable under the clause to be a reasonable pre-estimate and is not a penalty. I accept that the Landlord incurred a cost of approximately one-half month's rent to pay her agent to find new tenants. The liquidated damages sum is equivalent to this cost incurred by the Landlord. In any event, I find it is a reasonable pre-estimate of the costs, and is not punitive in nature. I accept that this amount is not small. However, this is a higher-end rental unit, and it appears the fees the Landlord had to pay were proportionate to the monthly rent. Therefore, I grant the Landlord's request to recover liquidated damages of $4,487.50 from the Tenant.

Next, I move to the second item claimed by the Landlord, for lost rent.

I note the following portion of the Act:

> ***Start of rights and obligations under tenancy agreement***
> ***16*** *The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, whether or not the tenant ever occupies the rental unit.*

I find the Landlord and the Tenant entered into the tenancy agreement, when the fixed term lease was signed, the deposits were paid, and first month's rent was paid on June 12, 2018. It appears the addendum was signed on June 13, 2018. The rights and obligations of both parties began at this time, regardless of whether or not the Tenant moved in.

Policy Guideline #30 states as follows:

> ***C. ENDING A FIXED TERM TENANCY***
>
> *During the fixed term neither the landlord nor the tenant may end the tenancy except for cause or by agreement of both parties, or under section G below (Early Termination for Family Violence or Long-Term Care).*
>
> *A landlord may end the tenancy if the tenant fails to pay the rent when due by serving a Notice to End Tenancy for Unpaid Rent or Utilities (form RTB-30) on the tenant. Alternatively, a landlord may end the tenancy for cause by serving a One Month Notice to End Tenancy for Cause (form RTB-33) on the tenant.*
>
> *[…]*
>
> *A tenant may not use the one month notice provisions of the Legislation to end the tenancy prior to the end of the fixed term except for breach of a material term by the landlord or under section G below (Early Termination for Family Violence or Long-Term Care). Any other one month notice will take effect not sooner than the end of the fixed term.*

In this case, I find there is insufficient evidence that there was any breach of a material term of the tenancy agreement, such that the Tenant had a legal basis to be discharged from the agreement. There are parameters which must be followed to end a tenancy for breach of a material term, under the relevant policy guideline. However, there is insufficient evidence these rules were followed. Policy Guideline #8 summarizes this as follows:

> *To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – must inform the other party in writing:*
>
> *-that there is a problem;*
> *-that they believe the problem is a breach of a material term of the tenancy agreement;*
> *-that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and*
> *-that if the problem is not fixed by the deadline, the party will end the tenancy.*

> *Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.*

There is insufficient evidence that the Tenant made it sufficiently clear that any of the issues raised by her about cleaning and fixing items were material to the agreement. The Tenant provided little explanation as to how any of the issues may have been material, that she gave a timeline to fix the issues, and that the timeline was reasonable. Ultimately, I do not accept that there was a breach of a material term which warrants the end of the tenancy. In fact, it appears the Tenant chose to back out because of her health issues.

I find the Tenant was not in a position to legally end the tenancy, without liability, and although the Landlord accepted the Notice of Breach document, just prior to the date the Tenant was set to move in, I do not find this absolves the Tenant's liability.

I note the following portion of Policy Guideline #3 – Claims for Rent and Damages for Loss of Rent:

> *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. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy.*
>
> *[…]*
>
> *In all cases the landlord's claim is subject to the statutory duty to mitigate the loss by re-renting the premises at a reasonably economic rent. Attempting to re-rent the premises at a greatly increased rent will not constitute mitigation, nor will placing the property on the market for sale.*

In this case, the earliest date the Tenant was legally able to end the tenancy was June 30, 2019.The Tenant agreed to rent the unit for $8,975.00, per month, for a period of 12 months. I find this is the amount the Landlord would have received, had the Tenant not

backed out. I find the Tenant is liable for this amount. However, the Tenant's ultimate liability is impacted by the Landlord's mitigation efforts. Policy Guideline #5 – Duty to Minimize Loss defines this issue as follows:

> ***B. REASONABLE EFFORTS TO MINIMIZE LOSSES***
>
> *A person who suffers damage or loss because their landlord or tenant did not comply with the Act, regulations or tenancy agreement must make reasonable efforts to minimize the damage or loss. Usually this duty starts when the person knows that damage or loss is occurring. The purpose is to ensure the wrongdoer is not held liable for damage or loss that could have reasonably been avoided.*
>
> *In general, a reasonable effort to minimize loss means taking practical and common-sense steps to prevent or minimize avoidable damage or loss. For example, if a tenant discovers their possessions are being damaged due to a leaking roof, some reasonable steps may be to:*
>
> - *remove and dry the possessions as soon as possible;*
> - *promptly report the damage and leak to the landlord and request repairs to avoid further damage;*
> - *file an application for dispute resolution if the landlord fails to carry out the repairs and further damage or loss occurs or is likely to occur.*
>
> *Compensation will not be awarded for damage or loss that could have been reasonably avoided.*
>
> ***Partial mitigation***
>
> *Partial mitigation may occur when a person takes some, but not all reasonable steps to minimize the damage or loss. If in the above example the tenant reported the leak, the landlord failed to make the repairs and the tenant did not apply for dispute resolution soon after and more damage occurred, this could constitute partial mitigation. In such a case, an arbitrator may award a claim for some, but not all damage or loss that occurred.*

I have reviewed the totality of the testimony, evidence and the submissions. I have considered the Landlord took steps to re-post the ad within a matter of days after finding out the Tenant wanted to back out of the agreement. I have also considered that the Landlord re-posted the ad at the same rent which the Tenant agreed to pay, and the

same rent it was rented for to the previous tenant. I find the Landlord had a reasonable basis to believe this was a “reasonable economic rent” for the starting point to re-list the unit. I have considered the timelines provided by the Landlord with respect to showings, and price reductions. Although the Landlord clearly put some thought and consideration into lowering the rent to attract prospective tenants and mitigate the losses, I find the reductions in price were likely spaced too far apart.

Even after factoring in that this is a higher end home, with a smaller pool of applicants, I find that a more responsive and time-sensitive pricing strategy could have been employed, given the limited interest over such a prolonged period. In some periods, the Landlord waited well over a month before making any price adjustments. This occurred on multiple occasions. I accept the market may have shifted following the Tenant’s breach of the agreement, which made it harder to rent. I also accept the Landlord took steps to reduce the price but I find the Landlord only partly mitigated her loss. In this case, I award a reduced amount of 50% of the rent sought on the application. The 50% reduction does not apply to the overall amount initially laid out (for $68,112.50), as the Landlord was not entitled to apply for more than $35,000.00 total. The amount of rent sought on application was $30,512.50. I award $15,256.25 for the rental losses, on top of the liquidated damages awarded.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was substantially successful with her application, I order the Tenant to repay the $100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security and pet deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	**Amount**
Lost Rent	$15,256.25
Liquidated damages	$4,487.50
PLUS: Filing Fee	$100.00
Subtotal:	$19,843.75
LESS: Security and Pet Deposit	$8,975.00
Total Amount	**$10,768.75**

Conclusion

The Landlord is granted a monetary order in the amount of **$10,768.75**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: February 3, 2021

Residential Tenancy Branch