



Dispute Resolution Services

Page: 1

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

The landlord filed an Application for Dispute Resolution on October 20, 2020 seeking an order to recover monetary loss of unpaid rent. and other money owed. Additionally, they applied for the cost of the hearing filing fee.

The matter proceeded by way of a hearing on February 8, 2021 pursuant to s. 74(2) of the *Residential Tenancy Act* (the “Act”). In the conference call hearing I explained the process and provided the both parties the opportunity to ask questions.

In the hearing, the landlord confirmed they delivered notice of this hearing and their prepared evidence to the tenants in separate packages on October 29, 2020. The postal record has it that this piece was received on October 30, 2020. The tenant in the hearing confirmed they received this package from the landlord.

Preliminary Matter

The *Residential Tenancy Branch Rules of Procedure* sets out the rule for the respondent’s submission of evidence. By Rule 3.15 they must ensure their evidence is served on the application and submitted to the Residential Tenancy Branch as soon as possible. This is not less than seven days before the hearing.

Here, the tenant’s evidence arrived at the Residential Tenancy Branch on February 5, 2021. This is three days prior to the hearing. In the hearing, I advised the parties this evidence would not receive consideration due to its late disclosure. This is an application of Rule 3.17.

Issues to be Decided

Is the landlord entitled to compensation for unpaid rent, and/or other money owed, pursuant to s. 67 of the *Act*?

Is the landlord entitled to reimbursement of the Application filing fee, pursuant to s. 72 of the *Act*?

Background and Evidence

The landlord provided a copy of the 8-page tenancy agreement. The tenants signed this agreement on September 2, 2020, as shown in the submitted copy. A signature from the landlord dated September 2, 2020 is on this copy as well.

The agreement outlines the fixed-term tenancy starting on October 1, 2020 and ending on March 31, 2021. The rent amount was \$3,000 for the 1st of each month. The agreement sets out that the amount of rent for September 2020 was pro-rated, at \$2,800. The tenant paid a security deposit of \$1,500.

For utilities, the agreement provides that the tenant is responsible to pay 70% of electricity, gas, water/sewer and 50% of cable/internet.

The agreement contains the following two clauses:

- **EARLY TERMINATION:** The tenant is prohibited from ending the tenancy before the end of the original term of this tenancy agreement [. . .] unless otherwise permitted by law or the terms of this tenancy agreement.
- **LIQUIDATED DAMAGES:** If the Tenant ends or gives notice to end tenancy before the end of the original Term of this Agreement [. . .] then the Tenant must pay the sum of \$1,500.00 to the Landlord as liquidated damages and not as a penalty. The Liquidated Damages is an agreed pre-estimate of the Landlord's administrative costs of advertising and re-renting the Premises as a result of the Early Termination.

The "Tenant's Covenants" section contains the following, at 4.1:

- The Tenant shall also pay the Landlord an additional Twenty-five Dollars (\$25.00) NSF fee for each payment which is returned to the Landlord due to there being insufficient funds in the account of the Tenant to cover such payment. The Tenant will also pay Twenty-five Dollars (\$25.00) Late Fee for each rent payment that is not delivered to the Landlord by the 1st of each and every month of this Tenancy Agreement.

The tenant raised the issue of their copy of the tenancy agreement not bearing the landlord's signature. They stated the landlord was not there in person on the date of signing to sign this agreement in person. They asked the landlord's agent who established the tenancy for an original copy on September 29, they received this version with the landlord's signature on October 5, 2020. They referred to this as a "new version" of the tenancy agreement, with more signatures on it. The copy they retained from the original meeting had the first and last page blank – another agent only was there on September 2, 2020.

The tenant submitted that a signed copy of the agreement must be provided to the tenant within 21 days as specified in s. 13(3) of the *Act*. Here, the landlord only supplied the agreement after 27 days. The tenant submits that if the provision of s. 13 of the *Act* are not met, then there is no agreement.

In the hearing, the landlord responded by setting out the way the agreement process works. The tenant signs the agreement, pays whatever is necessary, the landlord reviews the document and then signs it. In this way, the landlord reviews the application process, and the agreement does bear all signatures after a tenant has moved in. They stated the tenant received a copy on September 2, via email and uploaded to the "tenant portal".

At the outset of the hearing, the tenant confirmed that they did not occupy the unit from October 5, 2020. They notified the landlord of this on October 1, 2020, by email. A copy of this email is in the landlord's prepared evidence, containing the subject line: "Giving Notice for early vacating premises right now as we speak." The parties jointly scheduled a move-out meeting for October 5.

The landlord provided a copy of the Condition Inspection Form from this meeting, signed by the parties on October 5, 2020. For the move-out portion of the report, the tenant provided their signature to state: "I agree that this report fairly represents the condition of the rental unit." The notation in this section reads: "carpets not cleaned";

“kitchen still in same state as before”; “7 bulbs out. . . light bulbs still out”. All conditions where relevant on the report are marked as “S” for satisfactory.

At the bottom of the final page of the report, the tenant provided a forwarding address to the landlord.

The landlord’s monetary claim is as follows:

- a. October rent = \$3,000

The landlord presented that this is an application of the agreement’s Early Termination Clause. The landlord presented that new tenants moved into the unit on November 1, 2020. The landlord submitted a copy of the online advertisement showing an availability date of October 2. They also posted another ad showing the rent amount, posted on October 20, 2020.

- b. liquidated damages = \$1,500

This is the amount specified in the tenancy agreement. The agreement sets out the specific conditions for this amount. It also specifies that this is an “agreed pre-estimate of the landlord’s administrative costs” to re-rent the unit.

In the ledger for this tenant provided by the landlord, an entry for October 2 shows “Early Termination Fee” in the amount of \$1,500.

The landlord submitted a copy of the online advertisement showing an availability date of October 2. They also posted another ad showing the rent amount on October 20, 2020.

Thee tenant submits this is a penalty clause. This set amount does not present how much the actual amount is for the actual costs involved with re-renting the unit. The landlord’s duty to mitigate their losses includes re-renting as soon as possible, and this means a “duty to advertise.”

- c. utility amounts owing = \$107.66.

The landlord presented these three utility invoices:

- \$37.67 for Fortis BC

- \$32.87 for BC Hydro
- \$37.12 for cable/internet

These amounts reflect the percentages outlined in the tenancy agreement, calculated for the days the tenant was actually in the unit. They presented bills for each of these utilities, showing their calculation for the dates September 3 through to October 5 in the case of hydro, gas, and cable/internet. For each, this is a term of 32 days.

In the hearing, the tenant questioned why they are being billed for October when they were not living in the unit. They also pointed out that the bills were never in the tenant's own name.

d. NSF fee = \$50

Their prepared monetary order worksheet adds a \$50 amount as an NSF/late fee with reference to section 4.1 of the agreement.

The ledger shows a deposited payment marked as "RETURNED" on October 3, 2020. There are two entries on that same date showing: "NSF FEE" and "Late Fees & Other Charges" for \$25 each.

Analysis

The tenant raised the issue of s. 13 of the *Act* and stated because this provision was not met "there is no agreement".

I find the tenant was initially provided a copy of the agreement and was aware at all times of its terms. Had there been no agreement at all, and had the tenant submitted contradictory information to that of the landlord, then this would be a concern. The tenant did not raise any other issue with the terms of the agreement. Moreover, the tenant signed the agreement itself as it was presented to them on that date and did not express that there were any gaps in their knowledge. Moreover, they did not present any discrepancy in the terms therein.

Therefore, I find there is no concern with the validity of the agreement. The tenancy agreement was in place and both parties were aware of the terms therein.

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act*.

To be successful in a claim for compensation for damage or loss the applicant has the burden to provide sufficient evidence to establish the following four points:

1. That a damage or loss exists;
2. That the damage or loss results from a violation of the *Act*, regulation or tenancy agreement;
3. The value of the damage or loss; **and**
4. Steps taken, if any, to mitigate the damage or loss.

For each portion of the landlord's claim, I award the following amounts:

- a. October rent amount awarded = \$3,000

The *Act* s. 45(2) specifies that a tenant may end a fixed term tenancy by giving the landlord notice on a date that is: not earlier than one month after the date the landlord receives the notice; is not earlier than the date specified as the end of the tenancy; and is the day before the day in the month that rent is payable.

Here, the landlord's evidence is that the tenant gave notice – via email -- that is not in line with what the *Act* stipulates. This shows the tenant advised of their desire to discontinue the tenancy, advising the landlord of this on October 1, 2020. By October 5 the rental unit was vacant.

This is not proper notice as per the *Act*. The tenant was not entitled to give notice to end the tenancy for an effective date that was earlier than one month after the landlord received the notice. Therefore, the tenant is obligated to pay the landlord for the October 2020 full rent amount.

I find the landlord mitigated their loss by renting the unit once again for November 1, as they stated in the hearing. I find this minimizes the impact to the loss of rent. I so award the landlord \$3,000 for this part of their claim.

- b. liquidated damages amount awarded = \$0

The Residential Tenancy Branch has a set of *Residential Tenancy Policy Guidelines*. These are in place to provide a statement of the policy intent of the *Act*. On Liquidated Damages, Policy Guideline 4 provides: “The amount [of damages payable] 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.”

I find a framework for the clause – as set out above – is not in place. The clause appears arbitrary and is not a genuine pre-estimate of loss. That is to say, the costs of each of advertising and other administrative tasks associated with re-renting are not established. The landlord has not established how the cost itself will raise to \$1,500.

Also factoring into my assessment here are the online ads the landlord submitted. There is no evidence that this type of ad posting online comes at any cost. Further, in the tenant ledger, the amount is listed as “Early Termination Fee” -- I find this is more in line with a penalty.

In sum, I find the liquidated damages clause is invalid in that it is punitive in nature. In line with the four points set out above, I find the true value of a loss involving re-renting the unit is not established, and this arbitrary one-half rent amount is not an effort at mitigating the monetary loss.

For these reasons, I make no award for this portion of the landlord’s claim.

c. utilities owing, amount awarded = \$107.66

This is the amount shown in the receipts provided. I find the landlord has set out with accuracy the utility amounts accrued and owing by the tenant here. Contrary to what the tenant submitted, I find these amounts do not show utilities claimed throughout the month of October, and indeed specify the very last day of the tenancy.

d. late/NSF fees = \$50

These are set out clearly in the agreement. The tenant ledger shows a problem with payment in October; therefore, these amounts are applicable. I so award this \$50 amount.

The *Act* section 72(2) gives an arbitrator the authority to make a deduction from the security deposit held by the landlord. The landlord has established a claim of \$3,157.66. After setting off the security deposit, there is a balance of \$1,657.66. I am authorizing the landlord to keep the security deposit amount and award the balance of \$1,657.66 as compensation.

Because the landlord was successful in their claim, I award them the reimbursement of the Application \$100 filing fee.

Conclusion

Pursuant to section 67 and 72 of the *Act*, I grant the landlord a Monetary Order for \$1,757.66. 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 s. 9.1(1) of the *Act*.

Dated: March 1, 2021

Residential Tenancy Branch