



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held by teleconference on March 29, 2021. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage or loss under the Act;
- authorization to retain all or a portion of the Tenants' security deposit in satisfaction of the monetary order requested; and,
- to recover the cost of the filing fee.

The Landlord was represented at the hearing by an agent. The Tenants were represented at the hearing by their daughter/agent. The Tenants confirmed receipt of the Landlord's application and evidence package. The Landlord confirmed receipt of the Tenants' evidence package. Neither party took issue with the service of the documents. I find both parties sufficiently served their documentation for the purposes of this hearing.

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.

Issue(s) to be Decided

- Is the Landlord entitled to compensation for money owed or damage or loss under the Act?
- Is the Landlord entitled to keep the security deposit to offset the amounts owed by the Tenants?

Background and Evidence

The Landlord stated that although she initially indicated on her application that she was seeking money to cover strata fines, she is no longer wishing to pursue this item, as that issue has been dealt with. The Landlord only wished to recover the liquidated damages sum.

The tenancy agreement provided into evidence shows that monthly rent was \$2,100.00, and was due on the first of the month. The tenancy agreement started on July 18, 2020, and was for a fixed term until July 31, 2021. The Landlord stated that they hold a security deposit in the amount of \$1,050.00.

The Landlord is seeking \$1,050.00 in this application because the Tenants signed and agreed to the following liquidated damages term in the tenancy agreement:

(37). LIQUIDATED DAMAGES

If the tenant ends the fixed term tenancy before the end of the original term or if the tenant fails to give one full calendar months' notice on a month-to-month tenancy, the Landlord may, at the Landlord's option treat this Agreement as being at an end. In such event, the sum of half a month's rent plus GST will be paid by the Tenant to the Landlord as Liquidated Damages and not as a penalty to cover the administrative costs or re-renting the rental unit. The Landlord and Tenant acknowledge and agree that the payment of Liquidated Damages will not preclude the Landlord from exercising any further right of pursuing another remedy available in law or equity, including, but not limited to damage of the rental unit or residential property and damages as a result of lost rental income due to the Tenant's breach of any term of this agreement.

The Landlord stated that the Tenants provided notice that they would be vacating the rental unit in September 2020 sometime. The person in attendance at the hearing, on behalf of the Landlord, explained that she works for a real estate company. She explained that any time a rental unit is turned over, there are costs which are incurred by employees of the real estate company. These expenses cover things such as time spent posting ads, responding to inquiries, showing the unit to prospective tenants, screening applications, and completing paperwork. The Landlord stated that this liquidated damages clause is a genuine pre-estimate of the costs to re-rent, in the event the tenancy agreement is ended prior to the end of the fixed term lease.

The Landlord stated that the Tenant moved out at the end of November 2020, which was only part way through the term, which is why she feels it is reasonable for this amount to be sought (to help cover the Landlord's agents time and costs).

The Tenants acknowledge that they broke the lease prior to the fixed term expiry. However, they do not feel the Landlord did enough to re-rent the unit, and feel this amount is punitive. The Tenants stated that they did a lot of work for the Landlord to re-post the ad, and help find new Tenants.

The Landlord explained that the Tenants did not help much with the re-rental, and many costs were still incurred. The Landlord stated they were still required to manage the inquiries, the showings, the paperwork, all end of tenancy matters, even though the Tenants stated they tried to do some of the work.

The Landlord is not seeking any lost rent, as they were able to re-rent the unit, but are seeking this amount to help pay for the costs to re-rent.

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.

The Landlord is seeking to recover \$1,050.00, which is the equivalent of one half month's rent, for liquidated damages. The Landlord stated that this was agreed to up front in the tenancy agreement in the event the lease was broken early.

Residential Tenancy Policy Guideline 4 provides for liquidated damages as follows:

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 liquidated damages clause in the tenancy agreement is an enforceable term, as it is not extravagant compared to what rental losses could have been incurred following premature termination of the agreement. It also appears to be a genuine pre-estimate of the costs (including agent time) associated with re-renting the unit. I find the amount of a half month's worth of rent is not punitive, such that the clause is not enforceable. This term was agreed to up front. I award the full amount of this item, \$1,050.00.

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 Tenants 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 deposit to offset the money owed.

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

Item	Amount
Liquidated damages	\$1,050.00
PLUS: Filing Fee	\$100.00
Subtotal:	\$1,150.00
LESS: Security Deposit	\$1,050.00

Total Amount	\$100.00
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Conclusion

The Landlord is granted a monetary order in the amount of **\$100.00**, as specified above. This order must be served on the Tenants. If the Tenants fail 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: March 29, 2021

Residential Tenancy Branch