



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes: FFL MNDCL-S

Introduction

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

- a monetary order for monetary loss or money owed under the *Act*, regulation or tenancy agreement pursuant to section 67; and
- authorization to recover the filing fee for this application, pursuant to section 72.

HL('landlord') appeared and testified on behalf of the landlord in this hearing. SS appeared for the tenants. Both parties attended the hearing and were given a full opportunity to be heard, to present their sworn testimony, to make submissions, to call witnesses and to cross-examine one another.

At the outset of the hearing, the name of the tenant's first and last name was confirmed. As there was an error in the landlord's application, and as neither party was opposed, SS's name was amended to reflect SS's proper first and last name.

The tenants confirmed receipt of the landlord's application for dispute resolution hearing and evidence package. In accordance with sections 88 and 89 of the *Act*, I find that the tenant duly served with the landlord's application and evidence. The tenants did not submit any written evidence for this hearing.

Although the landlord had applied for a monetary Order of \$3,550.00 in their initial claim, since they applied another \$4,600.00 in lost rental income was accrued, which was not included in the original application. RTB Rules of Procedure 4.2 allows for amendments to be made in circumstances where the amendment can reasonably be anticipated, such as additional lost rental income since the time the Application for Dispute Resolution was made. On this basis, I have accepted the landlord's request to

amend their original application from \$3,550.00 to \$8,150.00 to reflect the additional lost rental income by the time this hearing was convened.

Issue(s) to be Decided

Is the landlord entitled to monetary compensation for money owed or losses?

Is the landlord entitled to recover the filing fee for this application from the tenants?

Background and Evidence

While I have turned my mind to all the documentary evidence properly before me and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of this application and my findings around it are set out below.

This fixed-term tenancy was to begin on November 1, 2020, and end on October 31, 2021. Monthly rent was set at \$2,300.00, payable on the first of the month. The landlord collected a security deposit in the amount of \$1,150.00 and a key FOB deposit in the amount of \$200.00 from the tenants, which the landlord still holds. The tenant testified in the hearing that they did not object to the landlord retaining the deposits to offset the losses associated with this tenancy.

It is undisputed by both parties that the tenants gave notice on October 31, 2020 that they would not be moving in. It is also undisputed that the tenants had provided the monthly rent for November 2020, and paid the deposits, which the landlord still holds. The tenant testified in the hearing that due to the global pandemic, their plans had changed and they had to cancel the tenancy agreement. The tenant testified that he felt that they had given the landlord adequate notice and compensation for ending the tenancy as they had never moved in. The tenant testified that the landlord had made an effort that if they paid the December 2020 rent, the tenants would not be responsible for any further losses associated with the fixed-term tenancy. The tenants also question whether the landlord fulfilled their obligations to mitigate their losses by re-renting the suite as the tenant saw the unit listed for sale in January 2021.

The landlord testified that the tenants had ended the fixed term tenancy before the end of the fixed-term, and as a result they suffered a loss in rental income, plus the additional costs associated with trying to fill the vacancy. The landlord testified that despite their efforts, they were unable to find a suitable tenant, and the owners had

decided to reside in the rental unit as of March 2021. The agent for the landlord testified that he had no knowledge of whether the unit was listed for sale or not.

The landlord's agent confirmed that they did make an initial offer to settle the dispute and avoid arbitration, but the tenants had declined the offer, and the landlord had to file for dispute resolution. The landlord's agent testified that this offer was no longer available to the tenants as the landlord had suffered further losses since the tenants had declined the initial settlement offer. The landlord submitted a copy of the tenancy agreement which states: *"If the tenant vacates prior to expiration of Lease the tenant will be responsible for liquidated damages of : \$__1150.00_____ This amount does not include loss of rent. The Landlord has a duty to mitigate loss by acting in a prompt manner to re rent the premise."*

The landlord is seeking the following monetary orders, which includes the liquidated damages as set out in the tenancy agreement.

Loss of Rental Income for December 2020 – February 2021	\$6,900.00
Liquidated Damages	1,150.00
Recovery of Filing Fee	100.00
Total Monetary Order	\$8,150.00

Analysis

Section 44 of the *Residential Tenancy Act* reads in part as follows:

44 (1) A tenancy ends only if one or more of the following applies:

- (a) the tenant or landlord gives notice to end the tenancy in accordance with one of the following:...
- (b) the tenancy agreement is a fixed term tenancy agreement that provides that the tenant will vacate the rental unit on the date specified as the end of the tenancy;
- (c) the landlord and tenant agree in writing to end the tenancy;...

Section 45(2) deals with a Tenant's notice in the case of a fixed term tenancy:

45 (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.

While the tenants did notify the landlord that they would not be moving in, and while they did provide the landlord with the November 2020 rent and security and key FOB deposits, the tenants did not end the fixed-term tenancy a manner that complies with the *Act*, as stated above.

I have considered the undisputed testimony that the landlord did propose a mutual agreement to the tenants to settle the dispute and allow the tenants to end the fixed-term tenancy early. In light of the evidence before me, I find that no mutual agreement was reached between the parties in writing allowing the tenants to end the fixed-term tenancy early, nor did the tenants obtain an order from the Residential Tenancy Branch for an early termination of this fixed term tenancy. No application for dispute resolution have been filed by the tenants. The tenants failed to continue with the tenancy agreement that was to end on October 31, 2021.

Although I find that the tenants did not comply with the *Act* in ending this fixed term tenancy, I must still consider whether the landlord fulfilled their duty to mitigate their losses.

I have considered the testimony of both parties as well as the evidence provided for this hearing. The tenant testified that they had noted that the landlord had listed the suite for sale. The landlord's agent testified that they had no knowledge of this, but confirmed that after unsuccessful efforts were made to re-rent the suite, the owners had decided to occupy the rental unit themselves as of March 2021. The landlord testified that they did mitigate their losses by advertising and attempting to fill the vacancy with a suitable tenant as soon as possible, but were unable to find a suitable tenant.

Residential Tenancy Policy Guideline #5 addresses a landlord's duty to minimize loss and states the following:

"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 loss¹. 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. The tenant who finds his or her possessions are being damaged by water due to an improperly maintained plumbing fixture must remove and dry those possessions as soon as practicable in order to avoid further damage. If further damages are likely to occur, or the tenant has lost the use of the plumbing fixture, the tenant should notify the landlord immediately. If the landlord does not respond to the tenant's request for repairs, the tenant should apply for an order for repairs under the Legislation². Failure to take the appropriate steps to minimize the loss will affect a subsequent monetary claim arising from the landlord's breach, where the tenant can substantiate such a claim.

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.

The Legislation requires the party seeking damages to show that reasonable efforts were made to reduce or prevent the loss claimed."

I have considered the fact the tenant's concerns that the landlord did not truly try to mitigate their losses by filling the vacancy. In light of the evidence and testimony before me, I am not satisfied that the landlord had provided sufficient evidence to support that they had attempted to fill the vacancy with a suitable tenant. I find that the landlord failed to demonstrate that they mitigated the losses claimed in their application as required by section 7(2) of the Act. I, therefore, dismiss the landlord's monetary claims for lost rental income for the months of December 2020 through to February 2021 without leave to reapply. I note that the tenants had paid the landlord the November 2020 rent, and as the November 2020 rent was not part of this dispute, I decline to make any findings pertaining to the November 2020 rent.

I must now consider whether the landlord is entitled to the \$1,150.00 in the liquidated damages.

Residential Tenancy Branch Policy Guideline #4 with respect to Liquidated Damages includes the following guidance with respect to the interpretation of such clauses:

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...

The landlord drafted the agreement calling for payment of \$1,150.00 as liquidated damages in the event that the tenants ended the tenancy before the end of the fixed term. Whether or not an amount specified in a contract should be construed as liquidated damages or as a penalty is a question of law to be decided upon on the basis of a consideration of the whole agreement. The amount claimed in an agreement as liquidated damages is intended to be an estimate of the loss that may be suffered by the landlord if the tenants breach the agreement by ending the tenancy early.

I am satisfied that the landlord is entitled to a monetary award of \$1,150.00 as set out in the tenancy agreement. I do so as I accept that this is not a penalty but a legitimate and reasonable estimate of the landlord's loss in the event of a breach to cover change over costs, such as advertising, interviewing, administration, re-renting of the rental unit due to the early termination of this tenancy. Although I noted above that the landlord failed to support the losses claimed for lost rental income associated with the early end of this fixed-term tenancy, I find that both parties had agreed in advance that \$1,150.00 in liquidated damages was payable to the landlord in the case that they ended this

tenancy early. I do not find this amount to be extravagant, and I find it to be a reasonable pre-estimate of the losses associated with the administration and other associated costs of re-renting the rental unit, regardless of whether a suitable tenant was found or not. Accordingly, I allow this portion of the landlord's monetary claim.

I find that the landlord is entitled to recover the \$100.00 filing fee paid for this application.

The landlord continues to hold the tenant's security and key fob deposits. The tenant testified in the hearing that the landlord may retain both their deposits to cover the landlord's monetary losses associated with the end of this fixed term tenancy. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the deposits in satisfaction of the monetary awards granted in this application.

Conclusion

I allow the landlord's monetary claim for liquidated damages, as well as \$100.00 for recovery of the filing fee. In accordance with the offsetting provisions of section 72 of the *Act*, I allow the landlord to retain the tenants' deposits in satisfaction of the monetary awards.

Liquidated Damages	\$1,150.00
Recovery of Filing Fee	100.00
Security and FOB deposit	-1,350.00
Remaining Security Deposit (Tenant agreed in hearing that the landlord may retain their deposits in full)	\$100.00

I note that \$100.00 remains from the tenants' deposits after offsetting the monetary awards granted in this application. As the tenant had agreed in the hearing for the landlord to keep both their deposits, I allow the landlord to keep the remaining \$100.00 of the tenants' security and key FOB deposit.

I dismiss the remainder of the landlord's monetary claims without leave to reapply.

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 30, 2021