



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDCL, MNRL, FFL

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution ("Application") under the *Residential Tenancy Act* ("Act"), for a monetary order for damage or compensation under the Act of \$887.50; and for a monetary order for unpaid rent in the amount of \$2,662.50; and to recover the \$100.00 cost of their Application filing fee.

The Tenant and an agent for the Landlord, J.J. ("Agent"), appeared at the teleconference hearing and gave affirmed testimony. I explained the hearing process to the Parties and gave them an opportunity to ask questions about the hearing process. During the hearing the Tenant and the Agent were given the opportunity to provide their evidence orally and to respond to the testimony of the other Party. I reviewed all oral and written evidence before me that met the requirements of the Residential Tenancy Branch ("RTB") Rules of Procedure ("Rules"); however, only the evidence relevant to the issues and findings in this matter are described in this Decision.

Neither Party raised any concerns regarding the service of the Application for Dispute Resolution or the documentary evidence. Both Parties said they had received the Application and/or the documentary evidence from the other Party and had reviewed it prior to the hearing.

Preliminary and Procedural Matters

The Landlord provided the Parties' email addresses in the Application and they confirmed these addresses in the hearing. They also confirmed their understanding that the Decision would be emailed to both Parties and any Orders sent to the appropriate Party.

Issue(s) to be Decided

- Is the Landlord entitled to a Monetary Order, and if so, in what amount?

- Is the Landlord entitled to recovery of the Application filing fee?

Background and Evidence

The Parties agreed that the fixed-term tenancy began on March 1, 2020, and was to run to February 28, 2021, with a monthly rent of \$1,775.00, due on the first day of each month. The Parties agreed that the Tenant paid the Landlord a security deposit of \$845.00, and no pet damage deposit. The Parties agreed that the Landlord no longer holds the security deposit, as it was returned to the Tenant after deducting an agreed upon cleaning fee of \$150.00.

The Tenant said he moved out of the rental unit on October 8, 2020, after having texted the Agent notice on September 11, 2020, of his intention to end the tenancy early. The Agent said he received an email with this notice on September 21, 2020. The Agent said he advertised for a new tenant on that day or the next day, to ensure he found someone to replace the Tenant as soon as possible.

The Landlord's claims are set out in the following table:

	Receipt/Estimate From	For	Amount
1	tenancy agreement	November 2020 rent	\$1,775.00
2	tenancy agreement	Half December 2020 rent	\$887.50
3	tenancy agreement	Liquidated damages	\$887.50
		Total monetary order claim	\$3,550.00

#1 & #2 RECOVERY OF RENT → \$2,662.50

The Landlord said:

The apartment was vacant for one month. We tried our best to advertise and show the unit. Someone moved in on December 15 - that's why we claimed this amount.

The Tenant said:

I don't agree with that, because I texted [the Agent] about moving out in September 11, so I personally asked to transfer the lease and he said he's going

to do that. He was going to ask for a higher price than the rent. While I tried my best to transfer the lease with that price, it was kind of impossible. He was trying to find a higher monthly rent, but I have to pay the rent until he finds someone. He was asking \$2,390.00.

The Agent said:

I don't know which day. . .September 21 I received an email for the move out notice, so on the same day I put an ad in . . . I also said you can't transfer the lease. Since you're still in middle of lease, the Landlord has a right to keep until the end of the lease. I never said you cannot transfer the lease.

I advertised for \$1,690.00 – less than what he was paying. . . . It's a bad season - no one wants to move.

The Tenant submitted a copy of the text communication he had with the Agent on September 11, 2020. The texts are as follows:

Tenant:

Hi [Agent], my wife is pregnant and we're expecting a baby next January. We are going to move out by the end of October. Hope it isn't too late to inform you. Also, I'm wondering what I can do to get my security deposit back. Do you need me to find another tenant?

Agent:

I will start to look for new tenant.
Your security deposit will be processed after you move out.
Of course you can refer new tenant

Tenant:

Sounds good how much you want for the rent then?

Agent:

\$2390

The Tenant also submitted a copy of an email he sent to the Agent on September 21, 2020 confirming the September 11, 2020 text discussion that he would be moving out at "no later than Oct 31st."

The Tenant submitted a copy of an advertisement that he found for the rental unit in October 2020. In this advertisement, the Landlord listed the rent as \$1,890.00 plus \$90.00 a month for parking, for a total of \$1,980.00 per month.

The Tenant submitted a copy of an email he sent to the Agent dated October 19, 2020, with his forwarding address. The Parties agreed that the Agent returned the Tenant's security deposit, less a \$150.00 cleaning fee on which they agreed.

The Landlord said:

So because they give me the notice early in sept, and I advertised . . . I think we still have time, then I reduced the rent to 1890 something then . . . but my price is flexible because I represent a landlord wants a reasonable price.

He told you that suite 606 was rented out for \$2300.00. I believe . . .

My point: I'm never firm on the price; I ask a higher and then reduced gradually.

The Tenant said:

The point for me is I can transfer my lease for the same price, but if you want to raise the price, it is going to be very challenging. All the evidence he did want a higher price, which from my perspective it was impossible, because during the pandemic people were moving out of [the City]. So I think he made it more difficult to transfer my lease.

The Agent said that he rented the suite to a new tenant for \$1,740.00 a month. The Agent submitted a copy of an advertisement for the rental unit dated December 12, 2020, in which the rent was listed at \$1,690.00

#3 LIQUIDATED DAMAGES → \$887.50

Section 4 of the Addendum to the tenancy agreement states:

4. Tenant Leaves Before the End of Tenancy

If the tenant request to leave before the end of this agreement set out in ITEM-2 of the Residential Tenancy Agreement, the Tenant hereby acknowledges and agrees to pay the Landlord/Landlord's Agent all the rent for the remaining months

of this agreement as Landlord's loss and additional rent in half-month as liquidated damage, and not as a penalty, to cover the administration cost and expense for re-renting this rental unit.

[emphasis added]

The Parties initialed this page of the Addendum, acknowledging their understanding of and agreement with the terms set out on that page.

The Tenant said:

I don't think it's reasonable; I can't transfer a lease. The core thing of this matter is the issue and laws, and the higher price that the Landlord wants. If we can transfer the lease with my price – I can probably get a tenant within a month, but with the price very high, all the losses are on me, first of all I can't afford, and secondly, I don't think it's fair and that's all I have to say.

The Agent said:

You know what, he's repeated the same thing over and over. I wanted him to show me the evidence. The lease, for my purposes, if they can transfer it to another tenant at another price, that's the best solution, so I don't have to find new tenant. I filed a claim, because he's a very good tenant, but after he left, he write me an email, and said I recorded everything you talked to me. This made me angry, this is illegal to record anything without my permission. I want him to pay the price.

The Tenant said:

I never – this is another misunderstanding; I didn't record anything. I meant from the text records – I haven't recorded any audio or video stuff. It's not relative to what we're talking about today.

I appreciate [the Agent's] help, and I gave him approximately two months' notice, and tried to get a new tenant at the price he gave me. I tried my best, and I never recorded any of this stuff. I have never recorded anything.

Analysis

Based on the documentary evidence and the testimony provided during the hearing,

and on a balance of probabilities, I find the following.

Rule 6.6 sets out the standard of proof and onus of proof in dispute resolution hearings, as follows:

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.

Before the Parties testified, I advised them of how I would analyze the evidence presented to me. I told them that a party who applies for compensation against another party has the burden of proving their claim on a balance of probabilities. Policy Guideline 16 sets out a four-part test that an applicant must prove in establishing a monetary claim. In this case, the Landlord must prove:

1. That the Tenant violated the Act, regulations, or tenancy agreement;
2. That the violation caused the Landlord to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the Landlord did what was reasonable to minimize the damage or loss.

("Test")

#1 & #2 RECOVERY OF RENT → \$2,662.50

Section 45 of the Act sets out a tenant's obligations regarding giving notice to end a tenancy. Section 45(2) of the Act deals with ending a fixed term tenancy, as follows:

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.

...

(4) A notice to end a tenancy given under this section must comply with section 52 *[form and content of notice to end tenancy]*.

[emphasis added]

A party with the burden of proof is required to mitigate their losses as best they can. In addition to step 4 of the Test, section 7(2) of the Act says that a landlord must who claims compensation for damage or loss must do whatever is reasonable to minimize the damage or loss. The undisputed evidence before me is that the Agent tried to get more for the rental unit than the Tenant was paying, but that he ultimately re-rented it for \$35.00 less in mid-December 2020.

The Agent said: "My point, I'm never firm on the price; I ask a higher and then reduced gradually." The Agent told the Tenant that he wanted \$2,390.00 a month for the rental unit, which is \$615.00 more than the Tenant was paying.

As the Tenant stated, the Agent was seeking a new tenant during a pandemic, which I find it reasonable to infer affects people's interest in viewing other people's residences – risking exposure to the virus. I find the Agent acknowledged this in his statement: "It's a bad season - no one wants to move."

I find that advertising for a higher rent during this global pandemic does not demonstrate mitigating or minimizing the loss. While the Agent said he was willing to negotiate the price down gradually, potential tenants may have been turned off and not bothered to enquire about the rental unit at the higher price. The Tenant said he saw it advertised in October 2020 for \$1890.00 plus \$90.00 parking, which was \$205.00 higher than the Tenant's rent was. Ultimately, the Landlord rented the unit for \$1,740.00, which was less than the Tenant paid, and which I find illustrates the condition of the rental market at that time. I find it is more likely than not that the Agent could have found a tenant for the rental unit sooner, if he had advertised for closer to or at what the Tenant was paying for rent.

When I consider the evidence before me, I find that the Landlord did not comply with section 7(2) of the Act, and I dismiss the Landlord's claim for compensation from the Tenant for unpaid rent in November and half of December 2020 without leave to reapply

#3 LIQUIDATED DAMAGES → \$887.50

A liquidated damages clause is a clause in a tenancy agreement in which the parties

agree in advance to payable damages, in the event of a breach of the tenancy agreement. Policy Guideline #4 ("PG #4") states the following about liquidated damages:

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.

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 unenforceable term in this set of circumstances, as the Landlord did not specify what it cost him to re-rent the rental unit through advertising and other measures.

Further, despite the statement in the Addendum that the liquidated damages is "not as a penalty...", I note the Agent's statement when discussing liquidated damages in the hearing. He said:

I filed a claim, because he's a very good tenant, but after he left, he write me an

email, and said I recorded everything you talked to me. This made me angry, this is illegal to record anything without my permission. I want him to pay the price.

As a result, without any evidence as to the administrative cost and expense for re-renting the rental unit, and with the evidence of the Agent's anger at the Tenant, I find that the liquidated damages clause is a penalty in this situation, as its purpose was clearly stated as

...and additional rent in half-month as liquidated damage, and not as a penalty, to cover the administration cost and expense for re-renting this rental unit.

As a result, and pursuant to section 7 of the Act and PG #4, I find that the liquidated damages clause as invoked as a penalty in this situation; and therefore, I strike it down and find it unenforceable for this purpose. I dismiss the Landlord's claim wholly without leave to reapply.

As the Landlord has been unsuccessful in the Application, I decline to award the Landlord with recovery of the \$100.00 Application filing fee.

Conclusion

The Landlord is unsuccessful in this Application, as the Agent failed to provide sufficient evidence to fulfill the burden of proof on a balance of probabilities. The Application is dismissed wholly 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: May 7, 2021

Residential Tenancy Branch