



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ONNI PROPERTY MANAGEMENT SERVICES
LTD. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

On January 14, 2021, the Landlord applied for a Dispute Resolution proceeding seeking a Monetary Order for compensation pursuant to Section 67 of the *Residential Tenancy Act* (the “Act”), seeking to apply the security deposit towards these debts pursuant to Section 38 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

B.B. attended the hearing as an agent for the Landlord and Tenant R.P. attended the hearing as well. At the outset of the hearing, I explained to the parties that as the hearing was a teleconference, none of the parties could see each other, so to ensure an efficient, respectful hearing, this would rely on each party taking a turn to have their say. As such, when one party is talking, I asked that the other party not interrupt or respond unless prompted by myself. Furthermore, if a party had an issue with what had been said, they were advised to make a note of it and when it was their turn, they would have an opportunity to address these concerns. The parties were also informed that recording of the hearing was prohibited and they were reminded to refrain from doing so. All parties acknowledged these terms. As well, all parties in attendance provided a solemn affirmation.

B.B. advised that a Notice of Hearing package was served to each Tenant by registered mail on January 15, 2021, and the Tenant confirmed that they received these packages. Based on this undisputed, solemnly affirmed testimony, and in accordance with Sections 89 and 90 of the *Act*, I am satisfied that the Tenants were sufficiently served the Landlord’s Notice of Hearing packages.

He also advised that the Landlord’s evidence was served to the Tenants by registered mail on April 26, 2021, and the Tenant confirmed that they received these packages. As service of this evidence complied with the timeframe requirements of Rule 3.14 of the Rules of Procedure, I have accepted all of the Landlord’s evidence and will consider it when rendering this Decision.

The Tenant confirmed that they did not submit any evidence for consideration on this file.

All parties were given an opportunity to be heard, to present sworn testimony, and to make submissions. I have reviewed all oral and written submissions before me; 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 a Monetary Order for compensation?
- Is the Landlord entitled to apply the security deposit towards these debts?
- Is the Landlord entitled to recover the filing fee?

Background and Evidence

While I have turned my mind to the accepted documentary evidence and the testimony of the parties, not all details of the respective submissions and/or arguments are reproduced here.

All parties agreed that the tenancy started on November 1, 2019 as a fixed term tenancy of two years, ending on October 31, 2021. However, the tenancy ended early when the Tenants gave up vacant possession of the rental unit on December 31, 2020. Rent was established at an amount of \$2,550.00 per month and was due on the first day of each month. A security deposit of \$1,275.00 was also paid. A copy of the signed tenancy agreement was submitted as documentary evidence.

All parties also agreed that the Tenants provided their forwarding address in writing on the move-out inspection report on December 31, 2020.

B.B. advised that the Landlord is seeking compensation in the amount of **\$2,550.00** because the Tenants were offered two months free rent, but this was contingent on the Tenants agreeing to a 24-month fixed term tenancy agreement. However, the Tenants gave written on November 8, 2020 to end this fixed term early, effective for December 31, 2020. He stated that the Tenants did not pay the first month's rent, which is equivalent of \$2,550.00. He referenced the "Additional Terms B" document of the tenancy agreement to support this agreement.

The Tenant advised that this document states that "If you're in breach of your tenancy, or have any arrears throughout the duration of your tenancy, this agreement/offer will be void." However, this does not indicate that the Landlord should be re-imbursed if the fixed term tenancy agreement is breached.

B.B. advised that the Landlord is seeking compensation in the amount of **\$1,050.00** because the Tenants were offered an incentive of free parking for two years, valued at \$75 per month, that was contingent on the Tenants agreeing to the 24-month fixed term tenancy agreement. However, the Tenants ended this fixed term early. He stated that the Tenants did not pay for parking for the 14 months that they occupied the rental unit, which is equivalent to \$1,050.00. Pursuant to the "Additional Terms B" document of the tenancy agreement, the Tenants should be responsible for this fee.

The Tenant reiterated that the "Additional Terms B" document indicates that the incentive would be void, and that there is no note that the Landlord would be reimbursed at all.

Finally, B.B. advised that the Landlord is seeking compensation in the amounts of **\$250.98** and **\$1,050.00** for the cost liquidated damages as the Tenants ended the fixed term tenancy early. He referenced the liquidated damages clause in the tenancy agreement, which indicates that \$1,275.00 would be owed by the Tenants should the fixed term tenancy be ended early. He stated that the Landlord charges a placement fee of \$1,050.00 and that a full-time leasing agent is hired to find new tenants. A commission is paid to the leasing agent based on the placement fee, and in this case, that amount was \$250.98. He submitted that the Landlord would have had to pay this commission twice as it was paid to find the Tenants originally, and then paid again because the Tenants ended the fixed term. He stated that a new tenant was found on or around November 18, 2020 and he submitted documentary evidence to support the Landlord's costs to re-rent the unit.

The Tenant advised that they provided the Landlord with eight weeks notice. As well, it is her understanding that the first prospective tenant was the person that the rental unit was rented to, and this person was found on November 18, 2020.

Analysis

Upon consideration of the testimony before me, I have provided an outline of the following Sections of the *Act* that are applicable to this situation. My reasons for making this Decision are below.

Section 38 of the *Act* outlines how the Landlord must deal with the security deposit at the end of the tenancy. With respect to the Landlord's claim against the Tenants' deposit, Section 38(1) of the *Act* requires the Landlord, within 15 days of the end of the tenancy or the date on which the Landlord receives the Tenants' forwarding address in writing, to either return the deposit in full or file an Application for Dispute Resolution seeking an Order allowing the Landlord to retain the deposit. If the Landlord fails to comply with Section 38(1), then the Landlord may not make a claim against the deposit, and the Landlord must pay double the deposit to the Tenants, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlord received the Tenants' forwarding address in writing on December 31, 2020 and the Landlord made an Application, using this same address, to attempt to claim against the deposit on January 14, 2021. As the Landlord made this Application within 15 days of receiving the Tenants' forwarding address in writing, I am satisfied that the Landlord has complied with the *Act*. Therefore, I find that the doubling provisions do not apply to the security deposit in this instance.

With respect to the Landlord's claims for damages, when establishing if monetary compensation is warranted, I find it important to note that Policy Guideline # 16 outlines that when a party is claiming for compensation, "It is up to the party who is claiming compensation to provide evidence to establish that compensation is due", that "the party who suffered the damage or loss can prove the amount of or value of the damage or loss", and that "the value of the damage or loss is established by the evidence provided."

Section 67 of the *Act* allows for an Arbitrator to determine the amount of compensation to be awarded to a party if a party has not complied with the *Act*.

Regarding the Landlord's claim for the return of the rent and parking incentives that the Tenants benefitted from when they agreed to a fixed term tenancy of two years but did not stay for the entire agreed upon length, I agree that the Additional Terms B document states that "If you're in breach of your tenancy, or have any arrears throughout the duration of your tenancy, this agreement/offer will be void." While it is the Tenants' position that this agreement does not specifically state that the Landlord is entitled to the incentives back if this agreement is breached, I do not find it reasonable or consistent with common sense or ordinary human experience that the Tenants should be entitled to these incentives despite not honouring the length of the term agreed upon. As such, I grant the Landlord a monetary award in the amount of **\$3,600.00** to satisfy these debts.

With respect to the Landlord's request for compensation in the amount of \$250.98 and \$1,050.00 for the cost of liquidated damages, Policy Guideline # 4 states that 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" and that the "amount agreed to must be a genuine pre-estimate of the loss at the time the contract is entered into". This guideline also sets out the following tests to determine if this clause is a penalty or a liquidated damages clause:

- 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.

Furthermore, I find it important to note that Policy Guideline # 5 outlines a Landlord's duty to minimize their loss when the Tenants end the tenancy contrary to the provisions of the Legislation, and that loss generally begins when the person entitled to claim damages becomes aware that damages are occurring. Moreover, the Landlord claiming loss must make reasonable efforts to re-rent the rental unit.

Based on the evidence and testimony before me, I am satisfied that there was a liquidated damages clause in the tenancy agreement that both parties had agreed to. However, this amount is meant to be calculated as a genuine pre-estimate of the Landlord's loss to re-rent the rental unit. While B.B. advised that the Landlord charges a placement fee when a fixed term tenancy is broken, other than the commission paid out to the leasing agent, there were no submissions made with respect to any additional costs incurred by the Landlord to re-rent the unit.

Apart from the commission to the leasing agent of \$250.98, I am satisfied that the Landlord failed to provide sufficient evidence of other administrative costs, or otherwise, incurred that would substantiate a loss equivalent to the \$1,275.00 liquidated damages amount being sought. I find that this is supported by the fact that a new tenant was found so quickly after the Tenants gave their notice to end the tenancy. Thus, it appears as if minimal effort was likely required to re-rent the unit. As such, I am satisfied that this amount constituted a penalty as opposed to the Landlord's genuine pre-estimate of loss. Consequently, I dismiss this claim in its entirety.

As the Landlord was partially successful in these claims, I find that the Landlord is entitled to recover the \$100.00 filing fee paid for this Application. Under the offsetting provisions of Section 72 of the *Act*, I allow the Landlord to retain the security deposit in partial satisfaction of these claims.

Pursuant to Sections 38, 67, and 72 of the *Act*, I grant the Landlord a Monetary Order as follows:

Calculation of Monetary Award Payable by the Tenants to the Landlord

Rent incentive payback	\$2,550.00
Parking incentive payback	\$1,050.00
Filing fee	\$100.00
Security deposit	-\$1,275.00
TOTAL MONETARY AWARD	\$2,425.00

Conclusion

The Landlord is provided with a Monetary Order in the amount of **\$2,425.00** in the above terms, and the Tenants must be served with **this Order** as soon as possible. Should the Tenants 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 Section 9.1(1) of the *Residential Tenancy Act*.

Dated: June 8, 2021

Residential Tenancy Branch