



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDCL, FFL

### Introduction

This hearing dealt with a landlord's application for a Monetary Order for damages or loss under the Act, regulations, or tenancy agreement.

Both the landlord and the tenant appeared for the hearing. The tenant was largely assisted by his partner who also appeared at the hearing. The parties were affirmed and the parties were ordered to not record the proceeding. Both parties had the opportunity to make relevant submissions and to respond to the submissions of the other party pursuant to the Rules of Procedure.

I confirmed the parties exchanged their respective hearing materials upon each other and I admitted their materials into evidence for consideration in making this decision.

The hearing process was explained to the parties and the parties were given the opportunity to ask questions about the process.

### Issue(s) to be Decided

Has the landlord established an entitlement to damages or losses under the Act, regulations, or tenancy agreement, as claimed?

### Background and Evidence

The parties entered into a two year fixed term tenancy agreement that started on July 1, 2019 and was set to expire on June 30, 2021. The tenant paid a security deposit of \$1647.50 and was required to pay rent of \$3295.00 on the first day of every month. The tenant also paid a \$300.00 "cleaning fee" to the landlord at the start of the tenancy.

Rent included utilities and the rental unit was provided to the tenant furnished and included linens.

The tenant subsequently requested the landlord provide increased internet service and the landlord did so. The parties agreed that the tenant would pay an additional \$20.00 per month for the improved internet service, for a monthly payment of \$3315.00.

On October 13, 2020 the tenant gave the landlord notice that he would be ending the tenancy on October 31, 2020. According to the landlord, he reminded the tenant he was in a 2 year fixed term and the tenant stated he would pay the rent for November 2020 and liquidated damages.

The parties met at the rental unit on October 31, 2020 and participated in a move-out inspection together.

The tenant paid the landlord \$1367.50 on November 1, 2020 which is the net sum of the monthly rent, less the security deposit, less recovery of the prepaid \$300.00 "cleaning fee".

The landlord submitted that replacement tenant(s) were secured on November 20, 2020 for a tenancy set to commence on December 1, 2020 for the lesser monthly rent of \$2995.00 for a one year fixed term.

Below, I have summarized the landlord's claims against the tenant and the tenant's responses.

**Cost to re-rent -- \$1777.13**

The landlord submitted that he advertised the rental unit online and he employed a broker to find a replacement tenant. The landlord has had more success finding tenants for furnished units using the brokerage. The broker charged the landlord \$1777.13 to find the replacement tenants.

The tenant's assistant questioned whether claiming for the cost to re-rent is allowable. The tenant's assistant questioned whether the cost is reasonable and fair and stated the landlord could have used free online advertising.

The landlord responded that he did use online advertising in addition to employing a broker.

### **Liquidated damages – \$3315.00**

The landlord pointed to the following term in the tenancy agreement as his basis for seeking liquidated damages:

#### **Liquidated Damages**

**24. In the event the tenant chooses to terminate tenancy before the end of the term the tenant shall pay the landlord the equivalent of one month of rent. The charge for liquidated damages is in addition to any charges for damages to the premises or furnishings.**

The landlord acknowledged that the liquidated damages was not for the estimated cost to re-rent the unit. The landlord stated that he drafted the liquidated damages clause as he was of the view the rental rate was discounted for the tenant because they entered into a two year fixed term tenancy.

The tenant's assistant stated the monthly rent was discounted from its advertised rate when the parties formed the agreement because the tenant negotiated for fewer services and facilities to be provided to him, namely parking and cleaning were not provided to the tenant.

The landlord acknowledged that there is no other place in the tenancy agreement or addendum that provides further explanation or calculation as to what estimated damages the liquidated damages clause was intended to cover and agreed upon.

### **Rent differential -- \$2240.00**

The landlord submitted that the rental market was slower when the tenancy ended due to the time of year and Covid-19. To avoid a vacancy the landlord posted the unit for a lesser amount and was successful in re-renting the unit for \$2995.00 starting December 1, 2020. The landlord seeks to recover the rent differential of \$320.00 per month for the seven months remaining in the tenancy from the tenant due to the tenant ending the tenancy early.

The tenant questioned whether a landlord may recover rent differential from the tenant. tenant's assistant submitted that the monthly rent was set very high when the tenancy started and that the market rent was lower than what the tenant was paying.

### **Cleaning fee -- \$300.00**

The landlord submitted that the tenancy application and the agreement required the tenant to pre-pay a \$300.00 “cleaning fee” at the start of the tenancy; however, the tenant deducted the cleaning fee from the amount he paid to the landlord for November 2020 rent. As such, the landlord seeks to recover this amount from the tenant.

The landlord acknowledged that after the tenancy ended he paid a cleaner only \$105.00; however, the landlord stated that the “cleaning fee” was intended to cover other costs to replace bedding and linens at the end of the tenancy, as he does at the end of every tenancy.

The tenant responded that he determined the landlord’s “cleaning fee” was unlawful so he deducted the amount paid from rent otherwise payable. The tenant questioned why he would be liable to pay a “cleaning fee” of \$300.00 when the actual cleaning cost was only \$105.00 and the linens provided to him were not new at the start of the tenancy. In any event, the tenant left the rental unit clean, as he spent a long time cleaning and as evidenced by the move-out inspection report, where the landlord wrote “unit clean”. The tenant left the rental unit after the move-out inspection was complete believing the landlord was satisfied with the condition in which he left the unit. The tenant questioned when the landlord took photographs.

The landlord acknowledged that he marked the move-out inspection report with the description of “unit clean” but the landlord explained that in doing so he was referring to the unit being “relatively clean” and free of garbage but that he did not intend to convey that the rental unit was left clean. The landlord submitted the tenant did not leave the rental unit clean, as evidenced by the photographs provided as evidence. The landlord stated that he had informed the tenant that a cleaner was coming shortly after the move-out inspection.

### **Analysis**

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 section 7 and 67 of the Act. Accordingly, an applicant must prove the following:

1. That the other party violated the Act, regulations, or tenancy agreement;

2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did whatever was reasonable to minimize the damage or loss.

Upon consideration of everything presented to me, I provide the following findings and reasons with respect to the landlord's claims against the tenant.

### **Cost to re-rent**

In this case, it is undisputed that the tenant ended the fixed term tenancy before the expiry date and I find this is a breach of the tenancy agreement by the tenant. The landlord provided evidence that he advertised the rental unit himself, online, and by hiring a broker. These actions are consistent with a landlord's duty to mitigate loss of rent as a landlord is expected to undertake whatever is reasonable to mitigate the loss of rent and this may include hiring a broker and/or lowering the rental rate.

The landlord was successful in securing replacement tenants via the broker and the broker charged the landlord for its services. The landlord provided a copy of the invoice he received from the broker and proof of payment.

Awards for damages are restorative and intended to put the party suffering the loss in the same position had the other party not breached. I find the landlord incurred costs of \$1777.13 to re-rent the unit and I find the tenant is responsible for compensating the landlord for the landlord's loss as the loss is the result of the tenant's breach of the tenancy agreement.

In light of the above, I grant the landlord's request to recover \$1777.13 from the tenant, as claimed.

### **Liquidated damages**

Residential Tenancy Policy Guideline 4: *Liquidated damages* provides information and policy statements concerning liquidated damages. The policy guideline provides, in part:

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.

[My emphasis underlined]

The landlord submitted that the liquidated damages clause was to compensate him for the discounted rent he provided the tenant for entering into a two year contract. The tenant denied this was specified to him in entering the tenancy agreement and pointed out that the rent was set at an amount lower than the advertised rent because he did not take advantage of some of the services offered, such as cleaning and parking.

I note that the liquidated damages clause in the tenancy agreement does not specify the damages that were estimated and agreed upon in entering the tenancy agreement. Also, the tenant's position appears to be supported by a notation on the tenancy application which states, "No parking" and "No cleaning". The tenancy agreement also provides that parking was not provided and there is no indication that regular cleaning service was to be provided.

Given the parties opposing position as to what damages the liquidated damages were to cover and the absence of that specificity in the tenancy agreement, I find the liquidated damages clause is easily interpreted as a penalty clause.

The contra proferentem rule provides that in interpreting contracts, where there is doubt about the meaning of the contract, the words will be construed against the person who drafted the contract. The landlord drafted the tenancy agreement, and as such, where there is doubt as to the meaning of a provision, the interpretation will be made in favour of the tenant and against the landlord.

In light of the above, and in keeping with the contra proferentem rule, I find the liquidated damages if likely a penalty clause that is unenforceable and I dismiss this portion of the landlord's claim.

### **Rent differential**

Residential tenancy Branch Policy guideline 3: *Claims for Rent and Damages for Loss of Rent* provides, in part:

The damages awarded are an amount sufficient to put the landlord in the same position as if the tenant had not breached the agreement. As a general rule this includes compensating the landlord for any loss of rent up to the earliest time that the tenant could legally have ended the tenancy. This may include compensating the landlord for the difference between what he would have received from the defaulting tenant and what he was able to re-rent the premises for the balance of the un-expired term of the tenancy. For example, a tenant has agreed to rent premises for a fixed term of 12 months at rent of \$1000.00 per month abandons the premises in the middle of the second month, not paying rent for that month. The landlord is able to re-rent the premises from the first of the next month but only at \$50.00 per month less. The landlord would be able to recover the unpaid rent for the month the premises were abandoned and the \$50.00 difference over the remaining 10 months of the original term.

[My emphasis underlined]

In this case, the tenant was paying rent of \$3315.00 per month and the landlord was able to mitigate loss of rent by re-renting the unit starting December 1, 2020 at a reduced rent of \$2995.00, a difference of \$320.00 per month.

Since the tenant ended the tenancy before its fixed term, the landlord is deprived of the monthly rent of \$3315.00 for the months of December 2020 through to June 31, 2021 and is only receiving \$2995.00 per month. Had the tenant not breached the fixed term tenancy by ending the tenancy early, the landlord would not have suffered a loss of \$320.00 per month for December 2020 through June 30, 2021 and I find no legal basis to deny the landlord recovery of this loss from the tenant.

The tenant argued that he was paying high rent; however, I find this argument does not extinguish the tenant's responsibility to fulfill his agreement to pay rent of \$3315.00 until June 30, 2021. The tenant's failure to fulfill that obligation results in the consequence of having to compensate the landlord the rent differential of \$2240.00 [ $\$320.00 \times 7$  months] and I award the landlord recovery of this sum from the tenant, as claimed.

## **Cleaning**

The landlord requested a "cleaning fee" from the tenant and pointed to the tenancy agreement in support of the tenant's obligation to pay that sum. Section 7 of the Residential Tenancy Regulations provides for the permissible non-refundable "fees" that

a landlord may charge a tenant. A cleaning fee is not one of the permissible “fees” a landlord may charge a tenant.

Where a tenant fails to leave a rental unit “reasonably clean” at the end of the tenancy, as required under section 37 of the Act, the landlord may claim for cleaning costs. The landlord produced an invoice showing he was charged \$105.00 to have the rental unit cleaned after the tenancy ended. However, the parties were in dispute as to the level of cleanliness at the end of the tenancy.

Section 21 of the Residential Tenancy Regulations provide that a condition inspection report prepared in accordance with the regulations is the best evidence of the condition of the rental unit in a dispute resolution proceeding unless there is preponderance of evidence to the contrary.

The condition inspection report prepared at the move-out inspection indicates the landlord determined the unit was “clean” at the end of the tenancy. While the landlord tried to explain at the hearing what he meant by “clean” in preparing the move-out inspection, the tenant relied upon the assessment that it was “clean” at the relevant time. In relying upon that representation, the tenant was not put on notice that there was any dispute as to the level of cleanliness and did not take photographs of the unit, and the landlord had the advantage to gather evidence, such as photographs, with the intention to claiming for cleaning costs. I view this conduct as being unfair.

I further note that the cleaning invoice indicates that the cleaner was providing a “deep clean” of the kitchen and bathroom as well as sanitizing light switches, among other things. Yet, a tenant is not responsible for a “deep clean” or sanitizing. A tenant’s obligation is limited to leaving the unit “reasonably clean”.

It is not uncommon for a landlord to turn over a rental unit to a new tenant in a very clean or impeccably clean condition; however, the cost to bring the level of cleanliness up from “reasonably clean” state to an impeccable state of cleanliness is not that of the out-going tenant.

The landlord further submitted that the cleaning fee of \$300.00 was intended to take into account the cost of replacing bedding and linens at the end of the tenancy. The landlord stated the bedding and linens are replaced at the end of every tenancy; however, the tenant refuted that he was provided with new bedding and linens. Under the Act, a tenant is not required to replace items provided for their use during the tenancy and the tenant’s use of bedding and linens would be part of paying rent. The



tenant has already been ordered to pay the landlord for the rent differential to the end for the fixed term. As such, I find the landlord has already been sufficiently compensated for the useful life of the bedding and linens.

For the reasons provided above, I find the landlord is not entitled to a “cleaning fee” from the tenant, the tenant is not responsible to pay for replacement bedding and linens he used during the tenancy, and I am unsatisfied the tenant is responsible to pay the cleaning cost of \$105.00 to bring the rental unit up to a reasonably clean condition. Therefore, I dismiss the landlord’s claim for cleaning.

### **Filing fee**

The landlord’s claim had some merit and I award the landlord recovery of the \$100.00 filing fee.

### **Monetary Order**

In keeping with all of my findings and awards above, the landlord is provided a Monetary Order to serve and enforce upon the tenant, as calculated below:

Cost to re-rent	\$1777.13
Rent differential	2240.00
Filing fee	<u>100.00</u>
Monetary Order	\$4117.13

### **Conclusion**

The landlord was partially successful in this Application for Dispute Resolution and is provided a Monetary Order in the sum of \$4117.13 to serve and enforce upon the tenant.

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 15, 2021

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Residential Tenancy Branch