



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding NACEL PROPERTIES LTD and
[tenant name suppressed to protect privacy]

DECISION

Dispute Codes MNDCL-S, FFL

Introduction

On March 15, 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 67 of the *Act*, and seeking to recover the filing fee pursuant to Section 72 of the *Act*.

L.H. attended the hearing as an agent for the Landlord; however, the Tenant did not attend the hearing at any point during the 21-minute teleconference. At the outset of the hearing, I informed her that recording of the hearing was prohibited and she was reminded to refrain from doing so. As well, she provided a solemn affirmation.

She advised that the Tenant was served the Notice of Hearing and evidence package on March 22, 2021 by registered mail (the registered mail tracking number is noted on the first page of this Decision). The tracking history indicated that this package was delivered on March 25, 2021. Based on this undisputed evidence, I am satisfied that the Tenant was sufficiently served the Landlord’s Notice of Hearing and evidence package. 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.

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.

L.H. advised that the tenancy started on November 1, 2020 as a fixed term tenancy ending on October 31, 2021. However, the tenancy ended when the Tenant gave her written notice on February 28, 2021 and she gave up vacant possession of the rental unit on March 1, 2021. Rent was established at \$1,500.00 per month and was due on the first day of each month. A security deposit of \$750.00 was also paid. A copy of the tenancy agreement was submitted as documentary evidence.

She indicated that the Tenant provided a forwarding address in writing on her notice to move out of the rental unit, on February 28, 2021.

She advised that the Landlord is seeking compensation in the amount of **\$750.00**, for the cost of liquidated damages, because the Tenant signed a fixed term tenancy starting on November 1, 2020 that was to end on October 31, 2021. However, the Tenant provided little written notice to end her tenancy. L.H. submitted that an ad was placed for the rental unit on their website immediately, that she spent approximately five hours showing the rental unit to prospective tenants, and that numerous repairs were done to the rental unit, totaling approximately 24 hours. A significant amount of this time was spent removing a film from the windows. She referenced the liquidated damages clause that was included as a term in the tenancy agreement.

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 Tenant's security 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 Tenant's 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 Tenant, pursuant to Section 38(6) of the *Act*.

Based on the consistent and undisputed evidence before me, the Landlord received the Tenant's forwarding address on February 28, 2021 and the tenancy ended on March 1, 2021. Furthermore, the Landlord made an Application, using this same address, to attempt to claim against the deposit on March 15, 2021. As the Landlord made this Application within 15 days of the tenancy ending, 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."

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

Based on the undisputed evidence before me, there is no dispute that the parties entered into a fixed term tenancy agreement from November 1, 2020 for a period of one

year, ending on October 31, 2021. Yet, the tenancy effectively ended when the Tenant gave notice to end the tenancy on February 28, 2021 and gave up vacant possession of the rental unit the next day. By giving notice this late in the month, I am satisfied that this would have significantly reduced the Landlord's likelihood of re-renting within a reasonable period of time.

With respect to the Landlord's claim in the amount of \$750.00 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.

Based on the undisputed evidence before me, I am satisfied that there was a liquidated damages clause in the tenancy agreement that both parties had agreed to. However, I am suspicious that this amount noted was an actual genuine pre-estimate of the cost to re-rent the unit, but rather simply chosen as it was conveniently equivalent to the security deposit.

Barring this, I am satisfied from the uncontested evidence that the Landlord made reasonable efforts to effectively mitigate this loss and re-rented the unit as quickly as possible on March 15, 2021, despite the significant costs to repair and/or clean the rental unit. As such, I grant the Landlord a monetary award in the amount of **\$750.00** to satisfy this claim.

As the Landlord was successful in this claim, 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 this claim.

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 Tenant to the Landlord

Liquidated damages	\$750.00
Filing fee	\$100.00
Security deposit	-\$750.00
TOTAL MONETARY AWARD	\$100.00

Conclusion

The Landlord is provided with a Monetary Order in the amount of **\$100.00** in the above terms, and the Tenant must be served with **this Order** as soon as possible. Should the Tenant 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: August 13, 2021

Residential Tenancy Branch