Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDL-S, MNDCL-S, FFL**

Introduction
The words tenant and landlord in this decision have the same meaning as in the *Residential Tenancy Act, (the "Act")* and the singular of these words includes the plural.

This hearing was convened to deal with the landlord's application pursuant to *Act* for:

- A monetary Order for Damages and authorization to retain a security deposit pursuant to sections 38 and 67;
- A monetary order for damages or compensation and authorization to retain a security deposit pursuant to sections 38 and 67; and
- Authorization to recover the filing fee for this application from the opposing party pursuant to section 72.

The landlord and both the tenants attended the hearing. The tenants were represented by co-tenant ZB ("tenant"). Both parties were advised that they were prohibited from recording the hearing pursuant to rule 6.11 of the Residential Tenancy Branch rules of procedure and advised they understood. As both parties were present, service of documents was confirmed. The tenant acknowledged service of the landlord's Application for Dispute Resolution package and the landlord acknowledged service of the tenant's evidence. Neither party raised any issues with timely service of documents however the landlord advised he was served by email. Despite this, the landlord declined the opportunity to seek an adjournment advising he had read the tenant's evidence and was ready to proceed to have the merits of his application heard.

Issue(s) to be Decided
Is the landlord entitled to: a monetary order for damages or compensation?
Can the landlord retain the tenants' security deposit?
Can the landlord recover the filing fee?

Background and Evidence

At the commencement of the hearing, pursuant to rules 3.6 and 7.4, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony. In accordance with rule 7.14, I exercised my authority to determine the relevance, necessity and appropriateness of each party's evidence.

While I have turned my mind to all the documentary evidence, including photographs, diagrams, miscellaneous letters and e-mails, and the testimony of the parties, not all details of the respective submissions and / or arguments are reproduced here. The principal aspects of each of the parties' respective positions have been recorded and will be addressed in this decision.

The parties agree that the rental unit is the lower unit of a house with an upper and lower unit. The landlord does not live in the upper unit. The fixed term tenancy began on December 1, 2020 with an end date of January 31, 2022. Rent was set at $1,300.00, payable on the first day of each month. A security deposit of $650.00 was collected by the landlord which he continues to hold. A condition inspection report was done and signed by the parties at the commencement of the tenancy.

A copy of the tenancy agreement was provided as evidence. I note clause 5 of the tenancy agreement reads:
If the tenant breaches a material term of this agreement that causes the landlord to end the tenancy before the end of any fixed term or if the tenant provides the landlord with notice whether written oral or by conduct of an intention to breach this agreement and end the tenancy by vacating and does vacate before the end of any fixed term the tenant will pay to the landlord the sum of $1300 as liquidated damage and not as a penalty for all costs associated with re renting the rental unit. Payment of such liquidated damages does not preclude the landlord from claiming future rental revenue losses that will remain unliquidated.

In his application, the landlord seeks to recover $1,300.00 compensation as "missed rent in March 2021". The landlord testified that the tenancy ended on February 28, 2021 after the landlord served the tenants with a One Month Notice to End Tenancy for Cause at the end of January.

The landlord testified that he did not show the rental unit to prospective tenants throughout the month of February for 3 reasons:

a) he was unsure of the condition of the rental unit,
b) he didn't know if the tenants would be gone by the effective date of the notice to end tenancy, March 1, 2021 and

c) February 2021 was during the height of the Covid-19 pandemic and that he didn't want to show the rental unit to prospective tenants.

On February 27th, the landlord emailed the tenants asking when they would be finished moving and when to meet for a condition inspection report. On March 1st, the tenant AA responded to the email advising that they had moved out early; they want their security deposit back and that they were uncomfortable in meeting the landlord in person so a "walkthrough" with the tenants would be unnecessary. On March 2nd, the landlord performed the condition inspection report without the tenants and provided them with a copy of it. In this email, the landlord points out the liquidated damages clause in the tenancy agreement and advises the rental unit was left unclean.

The landlord seeks $200.00 for cleaning the unit, having cleaned it himself with his wife. The landlord alleges dirty floors, appliances, and scuffed walls. Photos of the rental unit taken after the tenants vacated it were presented as evidence.

The landlord seeks an additional $500.00 as expenses incurred to re-rent the unit. He testified he had to advertise the unit, speak to prospective tenants and travel back and forth to show it. He does not live in the same city as the rental unit. No documentary evidence was supplied to corroborate the costs of $500.00.

The tenant gave the following testimony. He acknowledges he emailed the landlord indicating he didn't want to participate in the condition inspection report at the end of the tenancy as he didn't feel comfortable after a previous confrontation with the landlord. After he did research and discovered he was required to participate, he emailed the landlord offering to send his mother to participate, however this was done after the landlord had already completed the condition inspection report in the tenants' absence and sent the landlord a copy of it.

The tenant took photos of the rental unit the day they vacated it, February 26, 2021. The tenant testified that they did a deep clean of the unit. They cleaned the showers, floors and appliances and tried to get out all the scuffs on the walls. The wall scuffs left at the end of the tenancy were likely made as they were moving their belongings out, but the tenant considers those marks normal wear and tear.

The tenant acknowledges he signed the tenancy agreement with the liquidated damages claim but that clause was not pointed out to him when signing. The tenant argues that the landlord failed to mitigate his claim for rent not collected for March, 2021 by the landlord's own failure to seek a new tenant for the beginning of March. He never

got any requests from the landlord asking to show the unit throughout February. The tenant was willing to provide access to the rental unit during the last month of the tenancy.

The tenant refutes the additional $500.00 claim of the landlord, saying that ought to be part of the liquidated damages claim. The tenant testified they provided their forwarding address, the address of their church, to the landlord by registered mail which the landlord acknowledges receiving. I note the landlord filed his Application for Dispute Resolution seeking to retain the security deposit within 15 days of the last day of the tenancy.

Analysis

- Cleaning

Section 37(2) of the *Act* states that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear.

This notion is further elaborated in Residential Tenancy Branch Policy Guideline PG-1 which states:
the tenant must maintain "reasonable health, cleanliness and sanitary standards" throughout the rental unit or site, and property or park. The tenant is generally responsible for paying cleaning costs where the property is left at the end of the tenancy in a condition that does not comply with that standard. The tenant is also generally required to pay for repairs where damages are caused, either deliberately or as a result of neglect, by the tenant or his or her guest. **The tenant is not responsible for reasonable wear and tear to the rental unit or site (the premises), or for cleaning to bring the premises to a higher standard than that set out in the Residential Tenancy *Act* or Manufactured Home Park Tenancy *Act*** (the Legislation). **(emphasis added)**

I have carefully reviewed the photographs provided by the landlord to corroborate the claim for cleaning. I have also carefully reviewed the photos taken by the tenant on their last day of occupying the rental unit. I also note the condition inspection report done by the landlord at the end of the tenancy.

While the landlord's set of photographs show a suite that was left in a state that may not be described as "move-in ready", I find the unit was left reasonably clean and undamaged except for reasonable wear and tear. As stated in the policy guideline, the tenant is not responsible for reasonable wear and tear to the rental unit or site, or for

cleaning to bring the premises to a higher standard than that set out in the *Residential Tenancy Act*. I decline to award the landlord a monetary award for cleaning. This portion of the landlord's application is dismissed without leave to reapply.

- Liquidated Damages Claim or cost to re-rent the unit

Residential Tenancy Policy Guideline PG-4 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. Further, if the clause is a penalty, it still functions as an upper limit on the damages payable resulting from the breach even though the actual damages may have exceeded the amount set out in the clause.*

At the commencement of the tenancy, the tenant signed the tenancy agreement agreeing to clause 5, the liquidated damages clause. The fixed term tenancy ended

before the stated end date when the landlord served the tenant with a One Month Notice to End Tenancy for Cause and the tenant vacated to unit in accordance with the notice. The requisite criteria for granting the liquidated damages clause have been met.

A liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting a unit after a tenant's breach of the tenancy agreement. The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed term tenancy agreement is to attempt to limit the number of times the landlord must incur this cost.

I find it more likely than not that when a tenant breaches a fixed term tenancy agreement by ending the tenancy before the end of the fixed term, the landlord incurs the costs of re-renting earlier than it would have been prior to the breach. This exposes the landlord to associated additional costs. For that reason, I find there is a loss to the landlord associated with the tenancy ending before the end of the fixed term caused by a breach of the tenancy agreement by the tenants.

The next question is whether $1,300.00 meets the test of being a genuine pre-estimate of that loss. Although the parties agreed on the tenancy agreement that $1,300.00 was the pre-estimate of these costs, in his application and during the hearing, the landlord estimated $500.00 was his actual costs incurred to re-rent the unit. The landlord gave testimony about advertising the unit, communicating with prospective tenants about renting it and travelling from a different city to show it. I accept that $500.00 more closely matches the actual costs incurred to re-rent the unit and I award the landlord **$500.00** as sought.

The landlord seeks to recover $1,300.00 as missed rent for March 2021. Residential Tenancy Branch Policy Guideline PG-5: Duty to Minimize Loss, states the following:

A. LEGISLATIVE FRAMEWORK

Under section 7 of the *Residential Tenancy Act* (RTA), if a landlord or tenant does not comply with the *Act*, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for resulting damage or loss.

A landlord or tenant claiming compensation for damages or loss has a legal obligation to do whatever is reasonable to minimize the damage or loss.

(emphasis added)

…

Loss of Rental Income

When a tenant ends a tenancy before the end date of the tenancy agreement or in contravention of the RTA or MHPTA, the landlord has a duty to minimize loss of rental income. This means a landlord must try to:

1. re-rent the rental unit at a rent that is reasonable for the unit or site; and
2. re-rent the unit as soon as possible.

…

C. WHEN A NOTICE TO END TENANCY IS GIVEN

If a landlord issues a notice to end tenancy and is entitled to claim compensation for lost rental income, the landlord has a duty to minimize the loss by attempting to rent out the rental unit or site once the time limit for the tenant to dispute the notice expires.

In the case before me, the landlord acknowledged he did not attempt to find a new tenant for the month of March because:

a) he was unsure of the condition of the rental unit,
b) he didn't know if the tenants would be gone by the effective date of the notice to end tenancy, March 1, 2021 and
c) February 2021 was during the height of the Covid-19 pandemic and that he didn't want to show the rental unit to prospective tenants.

As of June 24, 2020, with the proclamation of Ministerial Order M195, landlords could enter rental units by providing the standard 24 hours notice before entering. The justification for not showing the unit due to the pandemic cannot be justified under the legislation. Further, the landlord based his actions on his assumption that the tenants would not vacate the unit by February 28th. This assumption turned out to be wrong as

the tenants had already vacated the unit well before that date. Lastly, I found the condition of the unit to be "reasonably clean", or within the limits of what is required by section 32 of the *Act*. I am not convinced any of the landlord's reasons for delaying the re-rental of the unit can be justified.

I find the landlord was legally obligated to mitigate the loss of rental income for the month of March 2021 and failed to do so. This portion of the landlord's claim is dismissed without leave to reapply.

- Security deposit

If a tenant fails to participate in a condition inspection report after the landlord gives the tenant 2 opportunities for inspection, the tenant's claim against the security deposit is extinguished pursuant to section 24(2) of the *Act*.

In this case, I find the landlord did not provide the tenant with those 2 opportunities as required under the *Act*, so the tenants' right to recover the security deposit is not extinguished. I also find the tenants clearly indicated to the landlord that they refused to participate in a condition inspection report after the landlord asked them for a mutually convenient date. The landlord completed the condition inspection report in the tenants' absence and provided a copy to them afterwards. I find the landlord's actions to be appropriate under the circumstances.

The landlord filed his Application for Dispute Resolution seeking to retain the security deposit within 15 days of receiving the tenants' forwarding address, their church. As the landlord filed in time pursuant to section 38(1), there will be no doubling of the security deposit upon return to the tenants. I therefore order that the landlord return the tenants' security deposit in the amount of $650.00, less the $500.00 awarded as costs to re-rent the unit.

- Filing fee

The decision to order the recovery of a filing fee is discretionary upon the arbitrator. I find the landlord was partially successful in his application and I award him half of the filing fee, or $50.00**.**

Item	**Amount**
Cost to re-rent the unit	$500.00
Filing fee	$50.00
Less security deposit	($650.00)
Total	**($100.00)**

Conclusion

I issue a monetary order in the tenants' favour in the amount of **$100.00**

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 11, 2021

Residential Tenancy Branch