



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding SUTTON GROUP DEL MAR REALTY and [tenant  
name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      MNDCT, OLC (Tenant)  
MNDCL-S, MNDL-S, MNRL-S, FFL (Landlord)

### **Introduction**

This hearing was convened by way of conference call in response to cross applications for dispute resolution filed by the parties.

The Tenant filed the application February 23, 2021 (the “Tenant’s Application”). The Tenant applied as follows:

- For compensation for monetary loss or other money owed
- For an order that the landlord comply with the Act, regulation and/or the tenancy agreement

The Landlord filed the application March 14, 2021 (the “Landlord’s Application”). The Landlord applied as follows:

- For compensation for monetary loss or other money owed
- For compensation for damage
- To recover unpaid rent
- To keep the security deposit
- For reimbursement for the filing fee

This matter came before me July 12, 2021 and was adjourned. An Interim Decision was issued July 12, 2021 and should be read with this decision.

The Agent for the Landlord appeared at both hearings. The Tenant appeared at both hearings. I explained the hearing process to the parties who did not have questions

when asked. I told the parties they were not allowed to record the hearing pursuant to the Rules of Procedure (the "Rules"). The parties provided affirmed testimony.

Two tenants were originally named on the applications for dispute resolution, S.G. and M.G. At the first hearing, it was determined that M.G. is a child and therefore I have removed M.G. from the applications for dispute resolution.

The Tenant withdrew the request for an order that the landlord comply with the Act, regulation and/or the tenancy agreement.

Both parties submitted evidence prior to the hearing. The Agent for the Landlord confirmed receipt of the hearing package and evidence for the Tenant's Application. The Tenant confirmed receipt of the hearing package and evidence for the Landlord's Application. The Tenant stated at the reconvened hearing that they had misplaced the Landlord's materials. I did not go into this further because the Landlord was only required to serve the materials on the Tenant and it was the Tenant's responsibility to ensure they did not misplace them.

The parties were given an opportunity to present relevant evidence and make relevant submissions. I have considered the documentary evidence and all oral testimony of the parties. I will only refer to the evidence I find relevant in this decision.

#### Issues to be Decided

1. Is the Tenant entitled to compensation for monetary loss or other money owed?
2. Is the Landlord entitled to compensation for monetary loss or other money owed?
3. Is the Landlord entitled to compensation for damage?
4. Is the Landlord entitled to recover unpaid rent?
5. Is the Landlord entitled to keep the security deposit?
6. Is the Landlord entitled to reimbursement for the filing fee?

### Background and Evidence

A written tenancy agreement was submitted as evidence and the parties agreed it is accurate. The tenancy started July 05, 2020 and was for a fixed term ending July 31, 2021. Rent was \$2,500.00 per month due on or before the first day of each month. The Tenant paid a \$1,250.00 security deposit. The agreement includes a liquidated damages clause at term five.

The parties agreed the Tenant vacated the rental unit February 28, 2021.

The parties agreed the Tenant provided their forwarding address on the Condition Inspection Report (the "CIR") on February 28, 2021.

The Agent for the Landlord acknowledged that the Landlord did not have an outstanding Monetary Order against the Tenant at the end of the tenancy.

The Agent for the Landlord pointed to the CIR in relation to the Tenant agreeing to the Landlord keeping the security deposit. Section 2 on page 3 of the CIR shows that the Tenant agreed to the Landlord keeping an amount "TBD" from the security deposit. The Tenant testified that the agreement on the CIR was for a deduction for cleaning. At the hearing, the Tenant agreed to the Landlord keeping \$150.00 for cleaning.

The Agent for the Landlord testified that the CIR is accurate. The Tenant testified that the CIR is accurate other than in relation to the date of the move-in inspection which was July 05, 2020 and not July 04, 2020 as stated on the CIR.

### ***Tenant's Application***

The Tenant sought the following compensation:

Item	Description	Amount
1	July 2020 - February 2021 rent	\$20,000.00
2	Moving expenses including building move-in/out fee for loss of quiet enjoyment	\$1,500.00
3	Security deposit	\$1,225.00
	<b>TOTAL</b>	<b>\$22,725.00</b>

The Tenant sought compensation for loss of quiet enjoyment and moving expenses due to issues with the rental unit during the tenancy which were disruptive and caused the Tenant to move out of the rental unit. The Tenant testified as follows about issues with the rental unit during the tenancy.

The tap at the kitchen sink was broken and the sink and cabinet below flooded when the tap was turned on. The Tenant could not use the sink for the first couple days of the tenancy. The leak was resolved a few days after the issue was discovered; however, the faucet still leaked into the cabinet below the sink which took a few months to resolve. The Tenant had to constantly wipe and clean the cabinet below the sink due to the leak.

There was no hot water in the rental unit from the start of the tenancy until late August. The Tenant had to call the Landlord a couple of times to get the hot water fixed.

The dishwasher did not work. The dishwasher had to be started multiple times and it still did not clean the dishes. The dishwasher had to be replaced which took a couple of months.

The bathtub was leaking from the start of the tenancy. A plumber was called a couple of times because there was a concern that the water would leak into the apartment below. The Tenant did not use the bathtub because of this. The bathtub was never replaced. A couple pieces of the bathtub were replaced and the Tenant was told to use it as it was. The Tenant never used the bathtub because they were worried it would flood the apartment below. It was five to six months between when the bathtub issue arose and when the Tenant was told the bathtub was fine to use as it was.

The rental unit did not have heat for months. In October, the Tenant turned the heat to the maximum setting; however, this would not heat the rental unit. The rental unit would not heat above 17 or 18 degrees at any given time. An electrician attended and said the heat had been fixed; however, it still did not work. It was then determined that the heat had to be turned on and off at the pipes in the rental unit. The Tenant did not have any heat in December. The Tenant advised the Landlord of the continuing heat issue in December around Christmas and was told that an electrician would be sent to look at it on a weekday when the office was open. The heating issue was not fixed until the end of December or start of January.

The light in the shower constantly burned out. The Tenant started hearing dripping sounds above the light. Water started dripping from the ceiling of the shower and later from the entire ceiling. It was the leak that was creating an electrical issue in the bathroom. There was then flooding issues in the bathroom.

There was a second leak in the ceiling of the rental unit.

The Tenant remained in the rental unit throughout the tenancy other than one day when it was very cold and the Tenant had to stay elsewhere. The Tenant had to shower at their sister's residence a few times because they could not shower at the rental unit due to the lack of hot water.

Technicians attended the rental unit daily or weekly throughout the tenancy due to all the issues with the rental unit. The Tenant had to leave work early to accommodate different technicians at different times. The Tenant's daughter had to miss class to accommodate technicians. At times, the Tenant was told different things about who was responsible to fix the issues with the rental unit. At times, the Tenant had to wait until a weekday to have the issues fixed because the cost of having them fixed on the weekend was higher. There were issues with the rental unit on a daily or weekly basis throughout the tenancy. The Tenant had planned to stay at the rental unit long term; however, the issues with the rental unit were so disruptive that the Tenant had to move out before the end of the fixed term.

The Agent for the Landlord testified as follows in relation to the issues raised by the Tenant.

The Tenant moved into the rental unit July 05, 2021 and the tenancy lasted eight months.

There was an issue with the garburator when the Tenant moved in and the invoice in evidence shows that it was replaced.

The kitchen sink faucet did require a missing part.

In the middle of August, the Tenant sent an email about new issues with the plumbing and hot water including the issue about the bathtub leaking. The stand-up shower was working fine. The diverter for the bathtub was not being used correctly. The Agent was present when the hot water in the shower was checked and there was hot water.

In relation to the bathtub leak, there was a floor mount faucet which did leak quite a bit and there was a diverter button missing. However, the main faucet that filled the bathtub was working fine.

In August, the Tenant let the Agent know that the dishwasher was not functioning properly and that they had to do a few cycles; however, the dishwasher was still functioning. The Agent let the owner know about this issue. There was ongoing back and forth and the owner requested two different quotes from two different companies. The owner wanted to know what the problem was and, once that was diagnosed, the broken part replaced. The Agent had to wait for final approval from the owner before replacing the dishwasher.

In relation to the heating issue, the Agent was first notified of the issue on December 15, 2020. The Agent contacted strata and management on December 15, 2020. The Agent contacted a plumber on December 15, 2020 to attend the rental unit to look at the issue. The issue was addressed December 16, 2020. The Agent did not hear anything further about a heating issue until January 10, 2021 when the Tenant sent a text about the heat not working for the last three days. A plumber was contacted January 11, 2021. The plumber ascertained that the issue was an electrical issue and electricians were contacted. The heat issue was resolved in late January.

There were many issues in the rental unit; however, the Agent did everything they could to attend to the issues.

In reply, the Tenant acknowledged that the Agent did their best to address the issues but noted that this did not make the rental unit better for the Tenant to live in comfortably.

The Tenant submitted the CIR, emails, photos, videos and text messages to support their claim.

The Landlord submitted emails and invoices in relation to the Tenant's claim.

**Landlord's Application**

The Landlord sought the following compensation:

Item	Description	Amount
1	Liquidated damages	\$2,500.00
2	Wall damage, unfilled holes, painting, cleaning	\$446.25
3	Unpaid rent	\$12,500.00
4	Filing fee	\$100.00
	<b>TOTAL</b>	<b>\$15,546.25</b>

**#1 Liquidated damages \$2,500.00**

The Agent testified as follows. The tenancy agreement states that if the Tenant breaches the lease, they would be liable for \$2,500.00. The Tenant signed the tenancy agreement and was fully aware of the liquidated damages clause. The Tenant gave notice to end the tenancy on January 02, 2021 ending the tenancy January 31, 2021. The Agent told the Tenant they could be liable for the liquidated damages as per the tenancy agreement. The Tenant ended up staying in the rental unit until the end of February and then moved out. The Tenant breached the fixed term lease and term five of the tenancy agreement applies.

The Tenant testified as follows. They agree they gave notice to end the tenancy on January 02, 2021 ending the tenancy January 31, 2021. They agree they ended up staying in the rental unit until the end of February and then moved out. They were allowed to give 30 days notice ending the tenancy. The living conditions in the rental unit were getting worse so the Tenant had to move out. They complied with section 45(3) of the *Act* in the December 15<sup>th</sup> email they sent the Landlord which is in evidence.

In reply, the Agent testified that the Landlord did not breach a material term of the tenancy agreement and the Tenant did not comply with section 45(3) of the *Act*.

**# 2 Wall damage, unfilled holes, painting, cleaning \$446.25**

As stated above, the Tenant agreed to pay the Landlord \$150.00 for cleaning costs. At the reconvened hearing, the Agent confirmed the Landlord is willing to accept \$150.00 for cleaning costs. Given this, I only heard the parties on the remaining issues including wall damage, unfilled holes and painting.

The Agent testified as follows. The entire rental unit was painted prior to the start of the tenancy. All holes were filled and sanded prior to the rental unit being painted. At move-out, there were numerous unfilled holes, nails and screws left in the walls. There were also numerous areas where paint had been damaged. There were dents in the walls. The damage was more than general wear and tear.

The Tenant testified as follows. They took a video of the rental unit prior to leaving and have submitted this. There was a lot of water damage in the rental unit. They did put nails in the walls to hang frames; however, this did not cause \$300.00 worth of damage.

***#3 Unpaid rent \$12,500.00***

The Agent testified as follows. The Tenant ended the tenancy in February. The tenancy was a fixed term tenancy until July of 2021. The Tenant is responsible for rent up until the rental unit was re-rented or the fixed term expired. The Landlord deposited the Tenant's March rent cheque; however, the cheque was cancelled. The rental unit was posted for rent in January when the Landlord received notice from the Tenant. The rental unit was posted for the same rent amount. The rental unit was not re-rented until May and therefore the Landlord lost two months of rent. The Landlord is only seeking \$5,000.00 and not \$12,500.00 as stated in the Landlord's Application.

The Tenant testified as follows. They should not be responsible for loss of rent for March and April. They were accommodating in relation to the Landlord trying to re-rent the unit. They posted the rental unit on two platforms. Any delay in re-renting the unit was due to repairs that had to be done in the rental unit. They agree the rental unit was posted for rent immediately upon them giving notice. They do not know if the Landlord posted the rental unit for the same rent amount. They do not know when the Landlord re-rented the unit.

In response to my questions, the Agent agreed there was damage in the rental unit at the end of the tenancy which had to be repaired. The Agent testified that the damage was caused by a faulty washing machine upstairs. The Agent testified that the damage had just occurred when the Tenant moved out and that the restoration company who attended did not know the extent of the damage at that time. The Agent testified that there was damage to the floor. The Agent testified that it took a month for the damage to be fixed.



The Landlord submitted the tenancy agreement, photos, the CIR, invoices and the Tenant's notice to vacate in support of their claim.

### Analysis

Pursuant to rule 6.6 of the Rules, it is the applicant who has the onus to prove their claim. The standard of proof is on a balance of probabilities meaning it is more likely than not the facts occurred as claimed.

When one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

### ***Security deposit***

Under sections 24 and 36 of the *Act*, landlords and tenants can extinguish their rights in relation to the security deposit if they do not comply with the *Act* and *Residential Tenancy Regulation* (the "*Regulations*"). Further, section 38 of the *Act* sets out specific requirements for dealing with a security deposit at the end of a tenancy.

Based on the CIR, I find the Tenant participated in the move-in and move-out inspections and therefore did not extinguish their rights in relation to the security deposit pursuant to sections 24 or 36 of the *Act*.

It is not necessary to determine whether the Landlord extinguished their rights in relation to the security deposit pursuant to sections 24 or 36 of the *Act* because extinguishment only relates to claims for damage to the rental unit and the Landlord has claimed for liquidated damages, cleaning and unpaid rent.

In relation to whether the Tenant agreed to the Landlord keeping some or all of the security deposit, section 38(4) of the *Act* states:

(4) A landlord may retain an amount from a security deposit or a pet damage deposit if,

(a) at the end of a tenancy, the tenant agrees in writing the landlord may retain **the amount** to pay a liability or obligation of the tenant...(emphasis added)

The Tenant must have agreed in writing to a specific amount to be kept from the security deposit for section 38(4) of the *Act* to apply. Based on the CIR, I find the Tenant did not agree to the Landlord keeping a specific amount of the security deposit and therefore section 38(4) of the *Act* does not apply.

Based on the testimony of both parties, I accept that the tenancy ended February 28, 2021.

Based on the testimony of both parties, I accept that the Tenant provided the Landlord with their forwarding address February 28, 2021.

Pursuant to section 38(1) of the *Act*, the Landlord had 15 days from the later of the end of the tenancy or the date the Landlord received the Tenant's forwarding address in writing to repay the security deposit or file a claim against it. Here, the Landlord had 15 days from February 28, 2021. The Landlord's Application was filed March 14, 2021, within time. I find the Landlord complied with section 38(1) of the *Act* and was entitled to claim against the security deposit.

### ***Compensation***

Section 7 of the *Act* states:

7 (1) If a landlord or tenant does not comply with this Act, the regulations or their tenancy agreement, the non-complying landlord or tenant must compensate the other for damage or loss that results.

(2) A landlord or tenant who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.

Policy Guideline 16 deals with compensation for damage or loss and states in part the following:

It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. In order to determine whether compensation is due, the arbitrator may determine whether:

- a party to the tenancy agreement has failed to comply with the Act, regulation or tenancy agreement;
- loss or damage has resulted from this non-compliance;
- the party who suffered the damage or loss can prove the amount of or value of the damage or loss; and
- the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

### ***Tenant's Application***

Section 28 of the *Act* states:

28 A tenant is entitled to quiet enjoyment including, but not limited to, rights to the following:

- (a) reasonable privacy;
- (b) freedom from unreasonable disturbance;
- (c) exclusive possession of the rental unit subject only to the landlord's right to enter the rental unit in accordance with section 29 [landlord's right to enter rental unit restricted]...

Section 32 of the *Act* states:

32 (1) A landlord must provide and maintain residential property in a state of decoration and repair that

- (a) complies with the health, safety and housing standards required by law, and
- (b) having regard to the age, character and location of the rental unit, makes it suitable for occupation by a tenant...

(5) A landlord's obligations under subsection (1) (a) apply whether or not a tenant knew of a breach by the landlord of that subsection at the time of entering into the tenancy agreement.

Policy Guideline 6 deals with a tenant's right to quiet enjoyment and states in part:

A landlord is obligated to ensure that the tenant's entitlement to quiet enjoyment is protected. A breach of the entitlement to quiet enjoyment means substantial interference with the ordinary and lawful enjoyment of the premises. This includes situations in which the landlord has directly caused the interference, and situations in which the landlord was aware of an interference or unreasonable disturbance, but failed to take reasonable steps to correct these.

Temporary discomfort or inconvenience does not constitute a basis for a breach of the entitlement to quiet enjoyment. Frequent and ongoing interference or unreasonable disturbances may form a basis for a claim of a breach of the entitlement to quiet enjoyment.

In determining whether a breach of quiet enjoyment has occurred, it is necessary to balance the tenant's right to quiet enjoyment with the landlord's right and responsibility to maintain the premises.

A landlord can be held responsible for the actions of other tenants if it can be established that the landlord was aware of a problem and failed to take reasonable steps to correct it.

#### Compensation for Damage or Loss

A breach of the entitlement to quiet enjoyment may form the basis for a claim for compensation for damage or loss under section 67 of the RTA...In determining the amount by which the value of the tenancy has been reduced, the arbitrator will take into consideration the seriousness of the situation or the degree to which the tenant has been unable to use or has been deprived of the right to quiet enjoyment of the premises, and the length of time over which the situation has existed.

A tenant may be entitled to compensation for loss of use of a portion of the property that constitutes loss of quiet enjoyment even if the landlord has made reasonable efforts to minimize disruption to the tenant in making repairs or completing renovations.

The videos and correspondence in evidence support that there were numerous issues with the rental unit throughout the eight-month tenancy. The same evidence shows that

some of the issues were serious, such as the lack of heat in December and January as well as a ceiling leak in the bathroom. I accept that some of the issues were quite disruptive, such as the dishwasher requiring a few cycles to clean dishes. I note that a dishwasher is part of the tenancy agreement pursuant to term three. I accept that all of the issues were at least an annoyance, particularly given the number of issues that occurred within a relatively short period of time. I also accept based on the number of issues and the correspondence in evidence that trades people were attending the rental unit regularly throughout the tenancy and I accept that this was disruptive.

Given the above, I am satisfied based on the evidence provided that the Landlord breached sections 28 and 32 of the *Act* as well as the tenancy agreement. I acknowledge that the Agent did what they could about the issues in the rental unit once made aware of them. However, all the Tenant must prove is a breach of the *Act*. I agree with the Tenant that the Agent acting on the issues once made aware of them did not change the existence of the issues or the Tenant's experience in the rental unit. Further, I find that some of the issues went on for too long, such as the heat issue in December and January, both cold months.

I am satisfied based on the evidence provided that the Tenant experienced loss because of the Landlord's breaches of sections 28 and 32 of the *Act* and the tenancy agreement. I find the loss to be a reduction in the value of the tenancy due to the numerous issues with the rental unit.

I am satisfied based on the correspondence in evidence that the Tenant advised the Agent of the issues in the rental unit and therefore mitigated their loss.

The issue here is whether the Tenant has proven the amount or value of the loss. The Tenant seeks \$22,725.00 being full rent for the entire eight-month tenancy, the security deposit and moving expenses including the building's move-in/out fees. I do not find the amount sought reasonable for the following reasons.

The Tenant continued to live in the rental unit for eight-months, other than for one day. Therefore, the Tenant was able to use the rental unit and is not entitled to reimbursement of all rent paid. Further, the issues in the rental unit were not serious enough to warrant reimbursing the Tenant for full rent for eight months.

In relation to the security deposit, the Landlord was entitled to claim against it and the Tenant is not entitled to automatic return of the security deposit based on issues with the rental unit during the tenancy.

In relation to moving expenses, these are rarely awarded as it is expected that these will be incurred at some point given the somewhat temporary nature of tenancies.

Given the Tenant has sought an unreasonable amount of compensation for the issues raised, I am left to determine an appropriate amount in the absence of a compelling basis for what that amount should be. In these circumstances, I award the Tenant \$800.00 being \$50.00 per month for six months of the tenancy and \$250.00 for two months of the tenancy. I arrive at this amount as I am satisfied it addresses the number, nature and seriousness of the issues with the rental unit. I arrive at \$250.00 for December and January when there was a lack of heat because I find this to be a serious issue and to warrant a higher amount than the remaining issues. In the absence of further compelling evidence from the Tenant that a higher amount of compensation is warranted, I am not satisfied that it is.

The Tenant is awarded \$800.00 pursuant to section 67 of the *Act*.

### ***Landlord's Application***

#### ***#1 Liquidated damages \$2,500.00***

Term five of the tenancy agreement is a liquidated damages clause and states:

LIQUIDATED DAMAGES. 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 \$2500** as liquidated damages 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. (emphasis added)

The Tenant is bound by the tenancy agreement.

The parties agree the tenancy was for a fixed term ending July 31, 2021. The parties agree the Tenant gave notice to end the tenancy on January 02, 2021 ending the tenancy January 31, 2021. The parties agree the Tenant moved out of the rental unit at the end of February of 2021.

Section 45 of the *Act* states:

(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.

(3) If a landlord has failed to comply with a material term of the tenancy agreement and has not corrected the situation within a reasonable period after the tenant gives written notice of the failure, the tenant may end the tenancy effective on a date that is after the date the landlord receives the notice.

(emphasis added)

The Tenant was not permitted to end the tenancy early unless section 45(3) of the *Act* applied. The parties disagree about whether the Tenant complied with section 45(3) of the *Act*. The Tenant pointed to an email from December 15<sup>th</sup> to support their position that they complied with section 45(3) of the *Act*.

Policy Guideline 8 deals with material terms and states in part:

To end a tenancy agreement for breach of a material term the party alleging a breach – whether landlord or tenant – **must inform the other party in writing:**

- that there is a problem;

- **that they believe the problem is a breach of a material term of the tenancy agreement;**
- that the problem must be fixed by a deadline included in the letter, and that the deadline be reasonable; and
- that if the problem is not fixed by the deadline, the party will end the tenancy.

Where a party gives written notice ending a tenancy agreement on the basis that the other has breached a material term of the tenancy agreement, and a dispute arises as a result of this action, the party alleging the breach bears the burden of proof. A party might not be found in breach of a material term if unaware of the problem.

(emphasis added)

The December 15<sup>th</sup> email does not mention a breach of a material term of the tenancy agreement and therefore is not a sufficient notice pursuant to section 45(3) of the *Act*. I find the Tenant did not comply with section 45(3) of the *Act*.

Given the above, I find the Tenant breached section 45(2) of the *Act* by ending the tenancy early. Further, I find term five of the tenancy agreement applies.

Policy Guideline 4 deals with liquidated damages and states 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.

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 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.

I am satisfied based on the wording of term five that the \$2,500.00 liquidated damages amount was a genuine pre-estimate of the loss at the time the contract was entered into and is not a penalty. I do not find the amount to be extravagant in comparison to the greatest loss that could follow a breach or oppressive to the Tenant as the amount is only one month's rent.

I am satisfied the Landlord is entitled to \$2,500.00 as liquidated damages.

**#2 Wall damage, unfilled holes, painting, cleaning \$446.25**

Section 37 of the *Act* states:

- (2) When a tenant vacates a rental unit, the tenant must
  - (a) leave the rental unit reasonably clean, and undamaged except for reasonable wear and tear...

Pursuant to the agreement of the parties and section 63 of the *Act*, the Landlord is entitled to \$150.00 for cleaning costs.

In relation to the wall damage and painting, the Landlord has submitted photos showing ten areas of nail holes or wall damage. Six of the photos show wall damage beyond nail holes. The invoice submitted to fix the damage is \$200.00 plus GST for a total of \$210.00. I accept based on the Landlord's photos that at least three areas of damage were beyond reasonable wear and tear as there are gouges in the wall that would need to be filled, sanded and painted. It was open to the Tenant to have this damage fixed at a cost they found reasonable; however, the Tenant did not do so. I am satisfied the Tenant breached section 37 of the *Act* in relation to the wall damage.

I am satisfied based on the photos of the Landlord that the Landlord had to have someone attend to fix the wall damage and paint.

I am satisfied based on the invoice that the Landlord paid \$210.00 to have the wall damage fixed and painted. I find this amount reasonable to cover the repair person's time, labour and materials. The Landlord is entitled to the \$210.00 sought.

**#3 Unpaid rent \$12,500.00**

As stated above, I am satisfied the Tenant breached section 45(2) of the *Act* by ending the tenancy early.

The parties agreed the Tenant moved out of the rental unit at the end of February.

I accept the Agent's testimony that the rental unit was not re-rented until May 01, 2021 as the Landlord has submitted the new tenancy agreement as evidence showing a start date of May 01, 2021. Therefore, I am satisfied the Landlord lost rent for March and April due to the Tenant's breach.

I am satisfied the Landlord mitigated their loss by posting the rental unit for rent as soon as they received notice from the Tenant. I am also satisfied the Landlord posted the rental unit for the same rent amount as the new tenancy agreement shows the new tenants are paying \$2,490.00 in rent per month.

The parties agree there was damage in the rental unit that required repair at the end of the tenancy. I understand the damage to be a ceiling leak and therefore I accept that it was more than minimal damage. I note that the Tenant has submitted a video of the ceiling leak. I also note that the Agent acknowledged it took a month for the damage to be fixed.

This is the Landlord's Application and the Landlord has the onus to prove they are entitled to two month's loss of rent. I find the Tenant has raised a compelling issue as to the rental unit requiring repairs at the end of the tenancy and this possibly deterring prospective tenants. I find the Landlord has not submitted sufficient evidence to show that the damage and required repairs did not deter prospective tenants. The Landlord has not submitted detailed evidence about the damage or repairs. The Landlord has not submitted evidence showing why the rental unit was not re-rented until May 01, 2021, such as correspondence between them and prospective tenants.

In the circumstances, I am satisfied the Landlord is entitled to one month of loss of rent for April when the repairs would have been completed and the rental unit was still not re-rented. I award the Landlord \$2,500.00 pursuant to section 67 of the *Act*.

#### **#4 Filing fee \$100.00**

Given the Landlord was partially successful in their claim, the Landlord is awarded reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

#### **Summary**

The Tenant is entitled to the following compensation:

Item	Description	Amount
1	July 2020 - February 2021 Rent	\$800.00
2	Moving expenses including building move-in/out fee for loss of quiet enjoyment	-
3	Security Deposit	-
	<b>TOTAL</b>	<b>\$800.00</b>

The Landlord is entitled to the following compensation:

Item	Description	Amount
1	Liquidated damages	\$2,500.00
2	Wall damage, unfilled holes, painting, cleaning not completed	\$360.00
3	Unpaid rent	\$2,500.00
4	Filing fee	\$100.00
	<b>TOTAL</b>	<b>\$5,460.00</b>

The Landlord is entitled to \$5,460.00. However, the Tenant is entitled to \$800.00 and therefore this amount is deducted from the amount owed to the Landlord. Given this, the Landlord is entitled to \$4,660.00. The Landlord can keep the \$1,225.00 security deposit pursuant to section 72(2) of the *Act*. The Landlord is issued a Monetary Order for the remaining \$3,435.00 pursuant to section 67 of the *Act*.

Conclusion

The Tenant is entitled to \$800.00 on their claim. The Landlord is entitled to \$5,460.00 on their claim. However, the \$800.00 is deducted from the \$5,460.00 and therefore the Landlord is entitled to \$4,660.00. The Landlord can keep the \$1,225.00 security deposit. The Landlord is issued a Monetary Order for the remaining \$3,435.00. This Order must be served on the Tenant. If the Tenant fails to comply with this Order, it 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 *Act*.

Dated: October 25, 2021

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Residential Tenancy Branch