



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

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

DECISION

Dispute Codes

MNDCL-S, MNRL-S, MNDL-S, FFL

Introduction

This hearing was convened by way of conference call in response to an Application for Dispute Resolution filed by the Landlord on April 21, 2021 (the "Application"). The Landlord applied as follows:

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

The Agent for the Landlord appeared at the hearing. Nobody appeared at the hearing for the Tenant. I explained the hearing process to the Agent who did not have questions when asked. I told the Agent they were not allowed to record the hearing pursuant to the Rules of Procedure (the "Rules"). The Agent provided affirmed testimony.

The Landlord submitted evidence prior to the hearing. The Tenant did not submit evidence. I addressed service of the hearing package and Landlord's evidence.

The Agent testified that the hearing package and evidence were sent to the Tenant by email April 30, 2021. The Agent testified that the parties communicated by email regularly during the tenancy. The Landlord submitted email communications between the parties. The Landlord submitted the email they sent to the Tenant April 30, 2021 with the hearing package and evidence attached.

Based on the undisputed testimony of the Agent and April 30, 2021 email, I am satisfied pursuant to section 71(2)(c) of the *Residential Tenancy Act* (the “Act”) that the hearing package and evidence were sufficiently served on the Tenant. In coming to this decision, I have considered sections 88(j) and 89(1)(f) of the *Act* as well as sections 43(1) and (2) of the *Residential Tenancy Regulation* (the “Regulations”). I am satisfied the Landlord was permitted to serve the Tenant by email because I accept the undisputed testimony of the Agent that the parties communicated by email regularly during the tenancy. Further, the Landlord submitted documentary evidence showing the parties communicated by email up until April of 2021. I am satisfied based on the undisputed testimony of the Agent and April 30, 2021 email that the hearing package and evidence were sent April 30, 2021. I find pursuant to section 71(2)(b) of the *Act* that the Tenant received the hearing package and evidence on May 03, 2021. In coming to this decision, I have considered section 44 of the *Regulations*. I also find the Landlord complied with rule 3.1 of the Rules in relation to the timing of service.

As I was satisfied of service, I proceeded with the hearing in the absence of the Tenant. The Agent was given an opportunity to present relevant evidence and make relevant submissions. I have considered all documentary evidence and oral testimony of the Agent. I will only refer to the evidence I find relevant in this decision.

Issues to be Decided

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

Background and Evidence

The Landlord sought the following compensation:

Item	Description	Amount
1	Missing keys	\$20.00
2	27 days of unpaid rent	\$1,291.42
3	Liquidated damages	\$300.00
4	Filing fee	\$100.00
	TOTAL	\$1,711.42

A written tenancy agreement was submitted as evidence. The written agreement had a start date of December 01, 2018. The written agreement was for a fixed term ending November 30, 2019. Rent was \$1,400.00 due on the first day of each month. The Tenant paid a \$675.00 security deposit. The agreement had an addendum with term 10 being a liquidated damages clause.

The Landlord submitted a lease extension letter extending the tenancy agreement until November 30, 2021. The rent was changed to \$1,472.00. The letter states that all other terms remain unchanged from the original lease dated December 01, 2017. The Tenant signed the letter in agreement on October 18, 2020.

The Agent testified that the tenancy started in December of 2017 and there was a written tenancy agreement prior to the written agreement submitted. The Agent confirmed that all written tenancy agreements had a liquidated damages clause. The Agent also testified that rent at the end of the tenancy was \$1,435.00 and not \$1,472.00.

The Agent further testified as follows.

The tenancy ended April 03, 2021.

The Landlord received a forwarding address from the Tenant by email April 06, 2021.

The Landlord did not have an outstanding monetary order against the Tenant at the end of the tenancy.

The Tenant did not agree to the Landlord keeping the security deposit.

The Condition Inspection Report (the "CIR") in evidence is accurate.

#1 Missing keys \$20.00

The Tenant was provided two keys at the outset of the tenancy which were not returned at the end of the tenancy. Each key cost \$10.00 to replace.

#2 27 days of unpaid rent \$1,291.42

The tenancy was for a fixed term ending November 30, 2021. The Landlord received an email from the Tenant March 25, 2021 ending the tenancy for April 02, 2021. The Tenant moved out of the rental unit April 03, 2021. The Tenant did not pay rent for April. The Landlord posted the rental unit for rent immediately after receiving the Tenant's notice. The unit was posted for \$1,575.00 per month in rent. The Landlord found new tenants for April 28, 2021. The Landlord lost rent for 27 days of April due to the Tenant ending the fixed term tenancy early.

#3 Liquidated damages \$300.00

As stated, the Tenant ended the fixed term tenancy early. Term 10 of the Addendum in the written tenancy agreement starting December 01, 2018 is a liquidated damages clause and applies. The terms of the written tenancy agreement starting December 01, 2018 were extended by the least extension letter. The Landlord had to go through the process of advertising the rental unit for rent and leasing the unit again which is the basis for the liquidated damages clause.

Documentary Evidence

The Landlord submitted the following documents:

- Written tenancy agreement starting December 01, 2018
- Lease extension letter dated October 16, 2020
- New written tenancy agreement with new tenants starting April 28, 2021
- Email notice ending the tenancy from the Tenant to the Agent
- The CIR including a Key Receipt
- The email from the Tenant with their forwarding address

Analysis

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 *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 undisputed testimony of the Agent and 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's claims are not for damage to the rental unit.

I accept the undisputed testimony of the Agent that the tenancy ended April 03, 2021.

I accept the undisputed testimony of the Agent that the Landlord received a forwarding address from the Tenant by email April 06, 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 April 06, 2021 to repay the security deposit or file a claim against it. The Application was filed April 21, 2021, within time. I find the Landlord complied with section 38(1) of the *Act*.

Compensation

Section 7 of the *Act* states:

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

(2) A landlord...who claims compensation for damage or loss that results from the [tenant'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.

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

#1 Missing keys \$20.00

Section 37(2)(b) of the *Act* states:

(2) When a tenant vacates a rental unit, the tenant must...

(b) give the landlord all the keys or other means of access that are in the possession or control of the tenant and that allow access to and within the residential property.

I accept the undisputed testimony of the Agent that the Tenant failed to return two keys at the end of the tenancy. I find the Tenant breached section 37(2)(b) of the *Act*. I accept that the Landlord had to replace the two keys. Based on the undisputed testimony of the Agent and Key Receipt, I accept that each key cost \$10.00 to replace and I find this amount reasonable. I award the Landlord \$20.00.

#2 27 days of unpaid rent \$1,291.42

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.

Section 53 of the *Act* states:

53 (1) If a landlord or tenant gives notice to end a tenancy effective on a date that does not comply with this Division, the notice is deemed to be changed in accordance with subsection (2) or (3), as applicable.

(2) If the effective date stated in the notice is earlier than the earliest date permitted under the applicable section, the effective date is deemed to be the earliest date that complies with the section.

Based on the undisputed testimony of the Agent and the lease extension letter dated October 16, 2020, I accept that the Tenant was in a fixed term tenancy ending November 30, 2021. Based on the undisputed testimony of the Agent and the Tenant's email notice, I accept that the Tenant gave notice March 25, 2021 ending the tenancy for April 02, 2021. Based on the undisputed testimony of the Agent, I accept that the Tenant moved out of the rental unit April 03, 2021.

There is no evidence before me that section 45(3) of the *Act* applied in this matter and therefore, I find the Tenant was not permitted to end the fixed term tenancy early. I find the Tenant breached section 45(2) of the *Act* by ending the fixed term tenancy early.

I accept the undisputed testimony of the Agent that the Tenant did not pay rent for April. Based on the undisputed testimony of the Agent and the new written tenancy agreement with new tenants, I accept that the Landlord did not re-rent the rental unit until April 28, 2021. Therefore, I accept that the Landlord lost rent for April 01 to April 27, 2021 due to the Tenant's breach.

I am satisfied the Landlord mitigated their loss to some extent by posting the rental unit for rent immediately after receiving the Tenant's notice. I do not find that posting the rental unit for a higher rent amount was appropriate as this is not mitigating one's loss. However, I award the Landlord 27 days of rent for loss of rent for two reasons. First, the Landlord did take some steps to mitigate their loss by posting the rental unit for rent immediately after receiving the Tenant's notice. Second, pursuant to section 53 of the *Act*, the earliest possible effective date of the Tenant's notice sent March 25, 2021 would have been April 30, 2021 and therefore I find the Tenant responsible for paying rent up until April 30, 2021 or the date the Landlord re-rented the rental unit which was April 28, 2021 in this matter.

I calculate 27 days of rent to be \$1,291.50; however, the Landlord sought \$1,291.42 and I award the Landlord the lower amount sought.

#3 Liquidated damages \$300.00

Term 10 of the written tenancy agreement starting December 01, 2018 states:

10. If the Tenant terminates the tenancy before the end of the original term, the landlord may, at the Landlord's option, treat his Tenancy Agreement as being at an end. In such event, the sum of \$300.00 shall be paid by the Tenant to the landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the said premises. The Landlord and Tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the Landlord from exercising any further rights of pursuing another remedy available in law or in equity, including but not limited to, damages to the premises and damages as a result of loss of rental income (up to a maximum of 2 months) due to the Tenant's breach of the terms of agreement.



Policy Guideline 4 deals with liquidated damages and states:

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.

I accept the undisputed testimony of the Agent that all written tenancy agreements had a liquidated damages clause which was the same as term 10 above. Based on the undisputed testimony of the Agent and lease extension letter dated October 16, 2020, I accept that the Tenant was bound by a liquidated damages clause which was the same as term 10 above in March and April of 2021. As stated, I accept that the Tenant ended the tenancy early and therefore I am satisfied the liquidated damages clause applies. I accept based on the undisputed testimony of the Agent and term 10 that the liquidated damages clause was a genuine pre-estimate of the loss at the time the tenancy agreement was entered into. I do not find \$300.00 to be an extravagant or oppressive

amount considering the rent amount was more than four times this. I award the Landlord the \$300.00.

#4 Filing fee \$100.00

Given the Landlord was successful in the Application, I award the Landlord reimbursement for the \$100.00 filing fee pursuant to section 72(1) of the *Act*.

Summary

In summary, the Landlord is entitled to the following:

Item	Description	Amount
1	Missing keys	\$20.00
2	27 days of unpaid rent	\$1,291.42
3	Liquidated damages	\$300.00
4	Filing fee	\$100.00
	TOTAL	\$1,711.42

The Landlord can keep the \$675.00 security deposit pursuant to section 72(2) of the *Act*. The Landlord is issued a Monetary Order for the remaining \$1,036.42 pursuant to section 67 of the *Act*.

Conclusion

The Landlord is entitled to \$1,711.42. The Landlord can keep the \$675.00 security deposit. The Landlord is issued a Monetary Order for the remaining \$1,036.42. 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 26, 2021

Residential Tenancy Branch