



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S, MNDCL-S, FFL

Introduction

This hearing was convened in response to an application by the Landlord pursuant to the *Residential Tenancy Act* (the “Act”) for Orders as follows:

1. A Monetary Order for unpaid rent - Section 67;
2. A Monetary Order for compensation - Section 67;
3. An Order to retain the security deposit - Section 38; and
4. An Order for the recovery of the filing fee - Section 72.

The Parties were each given full opportunity under oath to be heard, to present evidence and to make submissions. No issues were raised by either Party in relation to receipt of the other’s evidence.

Issue(s) to be Decided

Is the Landlord entitled to the monetary amounts claimed?

Is the Landlord entitled to retain the security deposit?

Is the Landlord entitled to recovery of the filing fee?

Background and Evidence

The following are agreed facts: the tenancy under written agreement started on September 1, 2020 for a fixed term to end August 31, 2021. The Parties mutually conducted a move-in inspection with an inspection report completed and copied to the Tenants. The Tenants moved out of the unit on April 30, 2021. At the outset of the

tenancy the Landlord collected a security deposit of \$2,500.00. Although the tenancy agreement sets out rents of \$5,000.00 payable on the first day of each month the actual monthly rent paid at onset and throughout the tenancy was \$4,700.00. The tenancy agreement includes a liquidated damage clause for one half the monthly rent payable.

The Landlord states that the Tenants were given two opportunities to conduct a move-out inspection. The first offer was made on April 30, 2021 for a May 3, 2021 inspection. The Tenants did not agree with this date and the Landlord made a second offer on an RTB approved form. The Tenants did not respond and did not attend the move-out inspection.

The Tenant states that the Landlord had been informed that they could not attend a move-out inspection as they were away from May 1 to 9, 2021. The Tenants did not know they could have an agent represent them for the inspection.

The Landlord states that while rent under the tenancy agreement is \$5,000.00 the Tenants were given a monthly rental discount of \$300.00 for the duration of the fixed term. The Landlord claims a return of that discount for 9 months in the sum of \$2,700.00. The Landlord confirms that nothing in the tenancy agreement provides for a return of the discount for any reason, including the early end of the fixed term. The Tenant states that the Landlord informed the Tenants of a \$300.00 monthly discount at signing and that, despite the tenancy agreement setting out rent of \$5,000.00 as far as the Tenants are concerned the rent payable was therefore only \$4,700.00. The Tenants argue that the Landlord is not entitled to a return of any discount.

The Landlord states that the Tenants did not provide their forwarding address. The Landlord states that they located the Tenants by conducting a title search. The Landlord claims \$12.85 as the cost of that search. The Tenant states that they verbally provided their forwarding address to the Landlord prior to moving out of the unit. The

Landlord denies that this verbal provision occurred. The Parties agree that the Landlord received the Tenants' forwarding address sent to the Landlord on July 15, 2021.

The Landlord claims \$1,363.95 as the costs to prepare for these proceedings.

The Landlord states that on April 4, 2021 the Tenant gave verbal notice to end the tenancy for the end of April or the beginning of May 2021. The Landlord states that on April 7, 2021 the Landlord also received the notice by email. The Landlord states that the unit was immediately advertised for \$5,500.00 and that a new tenant was obtained at this rental rate to start on May 31, 2021. The Landlord claims unpaid rent of \$4,396.77 as prorated rent for May 2021.

The Tenant states that by April 15, 2021 they obtained a tenant to take over the fixed term lease for the rent of \$4,700.00 being paid by the Tenant. The Tenant submits that the Landlord rejected this tenant in favour of obtaining monthly rent of over \$5,500.00. The Tenant submits that it is unfair to require the Tenants to pay rent on the fixed term tenancy until the Landlord obtains a new tenant with higher rent than was being paid by the Tenants.

The Landlord states that where the fixed term is ended early by the Tenants the tenancy agreement provides for liquidated damages of a half month's rent. The Landlord claims \$2,625.00 and states that this amount includes tax. The Tenant states that at signing the Landlord did not point out or make the Tenants aware of the liquidated damages clause. The Landlord states that this was discussed with the Tenants during the negotiations for entering into the tenancy. The Landlord also states that the Tenants were informed that if they broke the fixed term, they would be responsible for rents to the end of the fixed term.

The Landlord states that the Tenants' rent cheque for May 2021 was returned NSF. The Landlord claims \$50.00 as the administrative costs for the returned cheque. The Landlord states that the tenancy agreement provides for a late rent fee of \$25.00 and an NSF fee of \$25.00. It is noted that the tenancy agreement includes an addendum within which section 7 of that addendum sets out that "Administrative fees of \$50.00 will be assessed against each late rent payment" and that there is no provision for a returned cheque. The Landlord has not provided any evidence of a bank fee for the returned cheque.

The Landlord states that although the carpets in the unit were left clean the Tenants did not steam or shampoo the carpets at the end of the tenancy. the Landlord argues that the Tenants were to leave the carpets as found and that they were freshly shampooed at the outset of the tenancy. The Landlord claims \$147.00 as the costs of cleaning. The Tenants state that the carpets were left clean, were covered by large area carpets during the tenancy and that the carpets did not require steam cleaning. The Tenants refer to the Residential Tenancy Branch policy guideline that sets out such cleaning would only be necessary after a year long tenancy.

Analysis

Section 19 of the Act provides that

- (1) A landlord must not require or accept either a security deposit or a pet damage deposit that is greater than the equivalent of 1/2 of one month's rent payable under the tenancy agreement.
- (2) If a landlord accepts a security deposit or a pet damage deposit that is greater than the amount permitted under subsection (1), the tenant may deduct the overpayment from rent or otherwise recover the overpayment.

Given the undisputed evidence that the Landlord set the rent at \$4,700.00 from the start and for the duration of the fixed term tenancy I find that rent of \$4,700.00 was payable under the tenancy agreement and that the maximum amount of a security deposit permitted was \$2,350.00. As the Landlord collected \$2,500.00, I find that the Tenants

are entitled to recovery of **\$150.00**. I further consider that the Landlord's representation of the rental amount as a discount to be disingenuous and that there was no rental discount given.

Section 35(2) of the Act provides that the landlord must offer the tenant at least 2 opportunities, as prescribed, for the inspection. Section 36(1) of the Act provides that the right of a tenant to the return of a security deposit or a pet damage deposit, or both, is extinguished if

- (a) the landlord complied with section 35 (2) [*2 opportunities for inspection*], and
- (b) the tenant has not participated on either occasion.

Given the Landlord's undisputed evidence of two offers for a move-out inspection and the Tenants' evidence that they did not attend the move-out inspection, I find on a balance of probabilities that the Tenants' right to return of the security deposit is extinguished. The Landlord is therefore entitled to retain the security deposit plus zero interest of **\$2,350.00**.

Section 7 of the Act provides that where a tenant does not comply with the Act, regulation or tenancy agreement, the tenant must compensate the landlord for damage or loss that results. As no rental discount was given to the Tenants, I find that the Landlord has not substantiated an entitlement to the claimed discount of \$2,700.00 and I dismiss this claim.

Section 26 of the Act provides that a tenant must pay the rent when and as provided under the tenancy agreement whether or not the landlord complies with this Act, the regulations or the tenancy agreement. Section 44(1)(d) of the Act provides that a tenancy ended where the tenant vacates or abandons the rental unit. Rents are no longer payable after a tenancy ends. Based on the undisputed evidence that the Tenants moved out of the unit on April 30, 2021 I find that no rents were payable under the tenancy agreement for May 2021.

Section 45(2) of the Act provides that 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.

Based on the undisputed evidence that the Tenants did not give the Landlord the required notice for the fixed term tenancy I find that the Tenants breached the Act.

Section 7 of the Act provides that where a landlord or tenant claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement the claiming party must do whatever is reasonable to minimize the damage or loss. Although the Tenants breached the Act in ending the fixed term tenancy earlier than allowed based on the Landlord's evidence that the unit was advertised for a greater rental amount than the Tenants were paying, I find that the Landlord failed to take reasonable steps to minimize any loss of rent for May 2021. I therefore dismiss any claim for lost rental income of \$4,396.77 for May 2021.

Policy Guideline #4 provides 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. 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. As the tenancy agreement arbitrarily bases the liquidated damage sum on a percentage of the rental rate and as there is no evidence that this sum is based on anything other than the rental rate, I find that the Landlord has not substantiated that the amount is a genuine pre-estimate of the loss at the time the contract is entered into and that the sum is a penalty.

As the sum is a penalty, I find that it is not enforceable, and I dismiss the claim for liquidated damages.

Section 6(3)(a) of the Act provides that a term of a tenancy agreement is not enforceable if the term is inconsistent with this Act or the regulations. Section 7(1)(d) of the Act provides that an administration fee of not more than \$25 for the return of a tenant's cheque by a financial institution or for late payment of rent. As section 7 of the addendum requiring \$50.00 for the return of the cheque is not consistent with the Act, I find that this term is not enforceable. I therefore dismiss the claim for \$50.00.

Section 37 of the Act provides that when a tenant vacates a rental unit, the tenant must leave the rental unit reasonably clean. Policy Guideline #1 provides that "Generally, at the end of the tenancy the tenant will be held responsible for steam cleaning or shampooing the carpets after a tenancy of one year." Based on the undisputed evidence that the carpets were clean at the end of the tenancy that lasted less than one year I find that the Landlord has not substantiated that the Tenants failed to leave the carpets reasonably clean. I dismiss the carpet cleaning claim.

As nothing in the Act provides for a party's compensation for costs of participating in the proceedings or for the costs of evidence for the proceedings, I dismiss the Landlord's claim for compensation for its time in preparing for the hearing and for the costs of the title search used as evidence for this dispute.

As the Landlord has had some success with its claims, I find that the Landlord is entitled to recovery of the **\$100.00** filing fee for a total entitlement of **\$2,450.00**. Deducting the security deposit of **\$2,350.00** leaves **\$100.00** owing to the Landlord. Setting off the **\$150.00** from the Landlord's final entitlement that is owed to the Tenants leaves **\$50.00** owed to the Tenants.

Conclusion

I Order the Landlord to retain the security deposit plus interest of \$2,350.00 in full satisfaction of the claim.

I grant the Tenant an order under Section 67 of the Act for **\$50.00**. If necessary, this order may be filed in the Small Claims 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: November 29, 2021

Residential Tenancy Branch