



# Dispute Resolution Services

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Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Devon Properties Ltd.  
and [tenant name suppressed to protect privacy]

## **DECISION**

Dispute Codes      MNDCL-S, FFL

### Introduction

This hearing dealt with landlord's application for monetary compensation for damages or loss under the Act, regulations or tenancy agreement; and, authorization to retain the tenant's security deposit.

The landlord's agent appeared for the hearing; however, there was no appearance on part of the two named respondents. The landlord's agent was affirmed.

Since the respondents did not appear, I explored service of hearing materials upon each of the tenants.

The landlord's agent testified that the male tenant gave the landlord a forwarding address orally after the tenancy ended. A registered mail package was sent to each of the tenants at the forwarding address via registered mail on July 14, 2021. The registered mail packages were subsequently returned to the landlord.

Upon return of the registered mail packages, the landlord's agent contacted the tenant via telephone and the tenant informed the landlord that the unit number of the address the landlord used to send the registered mail was incomplete. The landlord testified that he is uncertain whether the tenant neglected to give him the correct unit number or if the landlord failed to hear and record the unit number correctly. During that phone conversation the landlord asked the tenant if the landlord could email the hearing materials to the tenant. The tenant agreed and provided his email address to the landlord. The landlord then sent a copy of the hearing materials to the tenant by email on August 13, 2021. The landlord did not receive a response to the email.

During the hearing, the landlord orally provided me the registered mail tracking numbers and orally described the tenant's email address used to email the hearing package. I

ordered the landlord to provide me with copies of the registered mail receipts and the email sent to the tenant on August 13, 2021. The landlord complied with my order by providing images of the returned registered mail packages, which included tracking numbers; and the email sent on August 13, 2021. I have copied the email address used to send the hearing package to the tenant on the cover page of this decision for further reference.

Monetary claims must be served in accordance with section 89(1) of the Act. Section 89(1) permits service by registered mail; however, the registered mail must be sent to the tenant's address of residence or the forwarding address provided by the tenant. The forwarding address provided by the tenant appears to be a commercial address but there is question as to whether the landlord sent the registered mail to the correct unit number at that address. Therefore, I decline to deem the registered mail to be served under section 90 of the Act.

Section 89(1)(f) of the Act and the regulations permit service by email so long as the email address used was an "email address provided as an address for service by the person". In the absence of any evidence to the contrary, I accept the landlord sent the hearing package to the male tenant at an email address the tenant provided for the purpose of being served. Therefore, I find the male tenant sufficiently served by email sent on August 13, 2021.

I find I have not been provided sufficient evidence to demonstrate the female tenant has been duly served by registered mail or email, or any other manner permitted under section 89(1) of the Act. Therefore, I exclude the female tenant as a named party to this dispute.

#### Issue(s) to be Decided

1. Has the landlord established an entitlement to recover liquidated damages and recovery of a promotional incentive from the tenant?
2. Is the landlord authorized to retain the tenant's security deposit?
3. Award of the filing fee.

### Background and Evidence

The parties executed a one year fixed term tenancy agreement set to commence on January 15, 2021 and expire on January 31, 2022. The tenants paid a security deposit of \$1075.00 and a pet damage deposit of \$1075.00.

The tenant provided an email to the landlord on April 30, 2021 informing the landlord they were ending the tenancy early, on May 31, 2021, due to “too much shit happening to my truck”. The tenants returned possession of the unit by May 31, 2021.

The landlord seeks to charge the tenants a liquidated damage amount of \$1000.00 as provided in clause 5 of the tenancy agreement.

Further, the landlord seeks recovery of a \$500.00 promotional incentive given to the tenants in the form of a Visa gift card for entering into a fixed term. The landlord provided a document entitled “Residential Tenancy Agreement - Promotion Addendum” in support of this claim.

The landlord’s agent submitted that the pet damage deposit was refunded to the tenants and the landlord continues to hold the security deposit pending the outcome of this decision.

Evidence provided by the landlord include: the tenancy agreement and the Promotion Addendum; the tenant’s notice to end tenancy; and, the move out inspection report.

### Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim. It is up to the party who is claiming compensation to provide evidence to establish that compensation is due. Awards for compensation are provided in section 7 and 67 of the Act, and, as provided in Residential Tenancy Policy Guideline 16: *Compensation for Damage or Loss* it is before me to consider whether:

- a party to the tenancy agreement violated the Act, regulation or tenancy agreement;
- the violation resulted in damages or loss for the party making the claim;
- the party who suffered the damages 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.

Upon consideration of everything before me, I provide the following findings and reasons.

### ***Liquidated damages***

Residential Tenancy Branch Policy Guideline 4 provides information and policy statements concerning liquidated damages, including the following excerpts:

*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.*

The tenancy agreement provides the following liquidated damages clause:

**5. LIQUIDATED DAMAGES:** If the Tenant ends this tenancy agreement in less than 12 months from the start of this tenancy agreement, the Tenant agrees to pay \$ 1000 to the Landlord as a genuine pre-estimate of the Landlord's costs for re-renting the rental unit, which costs include advertising and administration. The Tenant(s) agree that the liquidated damages fee is due and payable at the time they give notice of their intention to end this agreement prior to the date originally agreed to.

Considering there was no argument from the tenant and the liquidated damages amount is \$1000.00 compared to the monthly rent of \$2150.00, I accept that the amount of the liquidated damages is within reason and is not overly oppressive or indicative of a penalty. Therefore, I uphold the liquidated damages clause and I award the landlord \$1000.00 for liquidated damages as requested.

### **Repayment of promotional incentive**

The tenancy agreement provides a clause for describing the addendums that accompany the tenancy agreement. Below, I have reproduced the clause as it appears on the tenancy agreement presented to me as evidence by the landlord:

**39. ADDENDUM FOR SPECIAL TERMS AND CONDITIONS.** Attached to this tenancy agreement, there is \_\_\_\_\_ is not \_\_\_\_\_  
a) Number of Pages of the Addendum: \_\_\_\_\_  
b) Number of additional items in the Addendum: \_\_\_\_\_



According to clause 39, there is no indication that an Addendum accompanied the tenancy agreement.

The landlord presented a document entitled “Residential Tenancy Addendum – Promotion Addendum” as evidence in support of recovering \$500.00 from the tenant.

This “Promotion Addendum” describes provision of a \$500.00 gift card as an incentive for signing a one year fixed term tenancy agreement and the consequences if the tenant were to end the tenancy before the expiry of the fixed term. Below, I have reproduced the relevant term for repayment and the area for signature [with signatures obscured by me for privacy]:

D. If the Tenant(s) terminates the Residential Tenancy Agreement prior to the lease term's expiration, the Tenant(s) acknowledge and agree they will be responsible to repay any promotions described above that have been received during the term of the Residential Tenancy Agreement.

THE PARTIES HAVE EXECUTED THIS AGREEMENT BY THE SIGNATURE AND/OR BY SIGNATURE OF THEIR AUTHORIZED REPRESENTATIVES ON THE \_\_\_\_ DAY OF \_\_\_\_\_, 20 \_\_\_\_ . BY SIGNING THIS AGREEMENT, THE LANDLORD AND THE TENANT ARE BOUND BY ITS TERMS.

 _____ SIGNATURE OF TENANT	_____ DATE (MM/DD/YY)
_____ SIGNATURE OF TENANT	_____ DATE (MM/DD/YY)
_____ SIGNATURE OF TENANT	_____ DATE (MM/DD/YY)
_____ SIGNATURE OF TENANT	_____ DATE (MM/DD/YY)
 _____ SIGNATURE OF AGENT	1/14/2021 _____ DATE (MM/DD/YY)

This document fails to provide the date the agreement was reached and I only see one signature of a tenant on this document and that of the landlord's agent. In comparing the signature to the signature page of the tenancy agreement, I see what appears to be the signature of the other co-tenant that was excluded from this proceeding due to lack of service upon her. I do not see the signature of the tenant named in this decision on the "Promotion Addendum".

In the absence of reference to the existence of an Addendum in clause 39 of the tenancy agreement, which was signed by both co-tenants, and the absence of a date and signature of the named tenant on the "promotion Addendum", I find I am unsatisfied the tenant named on this decision agreed to repay the \$500.00 incentive to the landlord as a term of the tenancy agreement. Therefore, I dismiss this claim against the named tenant.

The landlord had some success in this Application for Dispute Resolution and I award the landlord recovery \$75.00 of the \$100.00 filing fee paid for this Application for Dispute Resolution.

In total, the landlord is awarded the sum of \$1075.00 for liquidated damages and \$75.00 toward the filing fee. The security deposit held by the landlord is \$1075.00. Therefore, I authorize the landlord to retain the tenant's security deposit in full satisfaction of the amounts awarded to the landlord with this decision.

Conclusion

The landlord was partially successful and is authorized to retain the tenant's security deposit in satisfaction of its claims against the tenant.

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: January 12, 2022

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Residential Tenancy Branch