



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes **MNDL-S, MNDCL-S, MNRL-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 dealt with an application filed by the landlord pursuant the *Residential Tenancy Act* (the "Act") for:

- A monetary order for damages caused by the tenant, their guests to the unit, site or property and authorization to withhold a security deposit pursuant to sections 67 and 38;
- An order to be compensated for a monetary loss or other money owed and authorization to withhold a security deposit pursuant to sections 67 and 38;
- A monetary order for unpaid rent and authorization to withhold a security deposit pursuant to sections 67 and 38; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

The tenant JG attended the hearing and the landlord was represented at the hearing by property manager, TG ("landlord"). As both parties were present, service of documents was confirmed. The tenant acknowledged service of the landlord's Notice of Dispute Resolution Proceedings packages for both tenants and the landlord acknowledged service of the tenant's evidence package. Both parties advised they had no concerns with timely service of documents.

The parties were informed at the start of the hearing that recording of the dispute resolution is prohibited under the Rule 6.11 of the Residential Tenancy Branch Rules of Procedure ("Rules") and that if any recording was made without my authorization, the offending party would be referred to the RTB Compliance Enforcement Unit for the purpose of an investigation and potential fine under the *Act*.

Each party was administered an oath to tell the truth and they both confirmed that they were not recording the hearing.

Issue(s) to be Decided

Should the landlord be awarded compensation?

Can the landlord recover the filing fee?

Background and Evidence

At the commencement of the hearing, I advised the parties that in my decision, I would refer to specific documents presented to me during testimony pursuant to rule 7.4. In accordance with rules 3.6, 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 on the following facts. The rental unit is the end unit in a strata property where six individual units are connected by common walls. The only way for 4 of the middle units to access their backyards is by entering the tenant's yard and crossing through it. The age of the rental unit is approximately 25 years old.

A copy of the tenancy agreement was provided as evidence. The fixed two-year tenancy began on June 1, 2021. Rent was set at \$2,900.00 payable on the first day of each month. A security deposit of \$1,450.00 was collected from the tenant which the landlord continues to hold. A condition inspection report was done at the beginning and end of the tenancy.

The landlord testified that the tenant ended the tenancy and gave him a notice to end tenancy on October 20th, ending the tenancy on October 31st. The landlord seeks to recover liquidated damages from the tenant for breaking the fixed term tenancy; rent for the month of November for not being able to find a tenant with short notice; estimated utilities for November; and compensation for damaged walls and a fence.

The tenant testified that when she accepted to the tenancy, the landlord did not advise her that her backyard would be accessed by the neighbouring units as part of "common property". The only common property pointed out to her was a small fenced area in front shared between herself and the neighbour beside her. When the occupants of the middle units need to access their backyards, they come around the corner and

accidentally surprise the tenant when she is there. This has caused the tenant to suffer from stress induced arrhythmia. The tenant testified that she had to remove herself from this situation immediately and accepted a tenancy at another rental unit close to where her children already go to school for November 1st. She didn't want to risk not getting that tenancy.

The landlord provided a monetary order worksheet. Each parties' submissions on each item are recorded together in this decision, although testimony was taken separately.

1. Broken fence

Landlord: the age of the fence was approximately 25 years old and it was rotted. It was replaced by the landlord after the tenant moved out. It was shared with the next door neighbour, so the landlord can't prove the tenant damaged it; all the landlord can prove is that it was intact at the beginning of the tenancy and had fallen down at the end.

Tenant: fence was in horrible condition. The night before the move out inspection, there had been a big wind and the wind simply blew it down. The tenant points to text messages sent to the landlord regarding the poor shape of the backyard at the beginning of the tenancy.

2. Drywall damage

Landlord: the tenant hung things on the master bedroom walls. It was sufficiently plastered and sanded, but the paint doesn't match the rest of the room. 2 walls need to be painted, but it has not been done. The landlord acknowledges he does not have a written estimate for the painting.

Tenant: There were pre-existing holes in the bedroom that the tenant fixed for the landlord at the end of the tenancy. The landlord's agent pointed out the extra paint under the stairs for touch ups which the tenant used at the end of the tenancy.

3. Liquidated Damages

Landlord: The landlord didn't consent to the tenant ending the tenancy before the end of the fixed term. The tenant moved out anyways without filing an application to the Residential Tenancy Branch seeking an arbitrator's order to end the tenancy. She gave notice and left. The tenant signed clause 5 to the tenancy agreement addendum agreeing to 75% of a month's rent as compensation for ending the tenancy early.

Tenant: The landlord failed to disclose that the other strata units would go through her backyard to access their own. The sudden appearance of people in her yard

caused her arrhythmia, a serious medical condition. She had to leave as soon as possible, rather than remain living in a place which could be a danger to her health.

4. November's rent

Landlord: the tenant only gave the landlord 11 days to find a new tenant for November. Between October 20th and October 31st, the landlord was unable to find a tenant capable of starting a tenancy in 11 days and had to accept a tenant who could move in on December 1st.

Tenant: the tenant was present for some of the showings and many of the prospective tenants said they were able to move in on November 1st. The tenant also argues that the landlord was aware as early as October 8 or 9 that she wanted to end the tenancy.

5. Utilities

Landlord: seeks one month's estimated utilities from when the tenant moved out until when they got a new tenant. Running fridge, heating the unit in the winter costs an estimated \$80.00.

Tenant: She had a good reason to leave and should not be responsible for paying the utilities.

Analysis

Section 7 of the *Act* states: 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. Section 67 of the *Act* establishes that if damage or loss results from a tenancy, an Arbitrator may determine the amount of that damage or loss and order that party to pay compensation to the other party. Rule 6.6 of the Residential Tenancy Rules of Procedure indicate the onus to prove their case is on the person making the claim and that the standard of proof is on a balance of probabilities.

Residential Tenancy Policy Guideline PG-16 [Compensation for Damage or Loss] states at Part C:

In order to determine whether compensation is due, the arbitrator may determine whether:

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

4. the party who suffered the damage or loss has acted reasonably to minimize that damage or loss.

- [the 4-point test]

1. Fence

Based on the landlord's testimony that the fence is likely 25 years old or more, together with the photos of the fence which clearly shows damage from rotting, I find that, on a balance of probabilities, the fence likely blew down in the wind as the tenant claims, not due to damage inflicted upon it by the tenant or her children. The landlord's claim for repairing the fence is dismissed.

2. Drywall damage

Residential Tenancy Branch Policy Guideline PG-1 [Landlord & Tenant – Responsibility for Residential Premises] states:

PAINTING

The landlord is responsible for painting the interior of the rental unit at reasonable intervals. The tenant cannot be required as a condition of tenancy to paint the premises. The tenant may only be required to paint or repair where the work is necessary because of damages for which the tenant is responsible.

I have reviewed the photos presented by the landlord and I do not find the tenant did significant damage to the walls. Moreover, I find credibility in the tenant's testimony that she was told to use the leftover paint given to her for touching up the holes in the bedroom. Lastly, the landlord acknowledged that the walls were not painted before the next tenant moved in and that it was his own estimate as to the cost to paint the walls. I find the landlord did not provide sufficient evidence to satisfy me the tenant damaged the walls or to satisfy me the value of the damage he seeks (points 2 and 3 of the 4 point test). As such, I dismiss this portion of the landlord's claim.

3. Liquidated Damages

PG-4 [Liquidated Damages] 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.

The tenant signed the tenancy agreement and as such, she agreed each of the clauses contained in addendum. Despite the argument that she had a valid reason for ending the tenancy before the end of the fixed term, she was still bound to honour the contract (the tenancy agreement) and the liquidated damages clause therein. The tenant had other avenues to get out of the tenancy, such as subletting or assigning the tenancy (an option the landlord cannot unreasonably withhold under the *Act*), but she did not do so, even though the tenant described the rental market in her location as “tight”.

I find the landlord has provided sufficient evidence to satisfy me the tenant agreed that she would compensate the landlord at 75% of a month’s rent if she were to terminate the tenancy prior to the agreed length of stay. I do not find the liquidated damages claim to be a penalty but is a genuine pre-estimate of the costs the landlord would incur to find a new tenant that the tenant agreed to. Consequently, I find the landlord is entitled to the **\$2,175.00** as claimed and award this amount to the landlord pursuant to section 67 of the *Act*.

4. November’s rent

PG-3 [Claims for Rent and Damages for Loss of Rent] states:

A tenant is liable to pay rent until a tenancy agreement ends...Where a tenant vacates or abandons the premises before a tenancy agreement has ended, the tenant must compensate the landlord for the damage or loss that results from their failure to comply with the legislation and tenancy agreement (section 7(1) of the *RTA* and the *MHPTA*). This can include the unpaid rent to the date the tenancy agreement ended **and the rent the landlord would**

have been entitled to for the remainder of the term of the tenancy agreement.

The tenant ended the tenancy before the end of the fixed term. In fact, the tenant agrees that she only gave the landlord 11 days notice that she was ending the tenancy. As the policy guideline states, the landlord is entitled to seek rent for the remainder of the tenancy agreement, although the landlord is required to mitigate this damage by finding a new tenant as soon as possible. I am satisfied that the landlord was unable to re-rent the unit for the month of November 2021, after being served with the tenant's notice to end tenancy on October 20th. Section 45(2) states 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.

I find that the tenant ended the tenancy not in accordance with section 45 and breached the tenancy agreement and the *Act*. I find that due to the tenant's breach, the landlord was deprived of rent for the month of November and should be compensated for this by the tenant. I award the landlord the equivalent of one month's rent, or \$2,900.00 pursuant to section 67 of the *Act*.

5. Utilities

The landlord testified that the \$80.00 he seeks is an estimate of how much it would cost to heat the unit and supply other miscellaneous utilities to it for the month of November. The landlord did not supply and utility bills or other means to justify the amount sought as compensation (point 3 of the 4 point test). Consequently, I dismiss this portion of the landlord's claim.

As the landlord's application was mostly successful, the landlord is also entitled to recovery of the \$100.00 filing fee for the cost of this application.

The landlord continues to hold the tenant's security deposit of \$1,450.00. In accordance with the offsetting provisions of section 72 of the *Act*, I order the landlord to retain the tenant's security deposit in partial satisfaction of the monetary award.

Item	amount
Liquidated damages	\$2,175.00
Rent for November 2021	\$2,900.00
Filing fee	\$100.00
Less security deposit	(\$1,475.00)
Total	\$3,700.00

Conclusion

I award the landlord a monetary order in the amount of \$3,700.00.

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: June 06, 2022

Residential Tenancy Branch