



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

## **DECISION**

Dispute Codes      MNDC MNR MNSD FF

### Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held, by teleconference, on June 14, 2022. The Landlord applied for multiple remedies, pursuant to the *Residential Tenancy Act* (the "Act").

The Landlord attended the hearing and provided affirmed testimony. The Tenant did not appear. The Landlord stated that he sent the Notice of Dispute Resolution Proceeding and evidence package to the Tenant by registered mail on November 17, 2021. Tracking information was provided at the hearing. Pursuant to section 90 of the Act, I find the Tenant is deemed to have received this package 5 days after it was sent, November 22, 2021.

Both parties were provided the opportunity to present evidence orally and in written and documentary form, and to make submissions to me. I have reviewed all oral and written evidence before me that met the requirements of the Rules of Procedure. However, only the evidence relevant to the issues and findings in this matter are described in this Decision.

### Issues to be Decided

- Is the Landlord entitled to a monetary order for unpaid rent and utilities or for damage or loss under the Act?
- Is the Landlord entitled to retain all or a portion of the Tenants' security and pet deposit in partial satisfaction of the monetary order requested?
- Is the Landlord entitled to recover the cost of the filing fee?

### Background and Evidence

The Landlord stated that the Tenants signed a fixed term tenancy agreement starting on May 1, 2021, and ending April 30, 2022. The Landlord provided a copy of the tenancy agreement. Monthly rent was set at \$1,500.00 and was due on the first of the month. The Landlord holds a security deposit in the amount of \$750.00.

The Landlord stated that on or around October 19, 2021, he found out the Tenant was going to be vacating the rental unit within a couple of weeks, and that she was planning on breaking the 1 year fixed term lease. The Landlord stated that he immediately reposted the ad to re-rent the unit the following day, on October 20, 2021. The Landlord stated he was able to re-rent the unit quickly but the new Tenants did not move in until November 15, 2021. The Landlord stated that this Tenant moved out on November 5, 2021.

The Landlord is seeking the following items:

- 1) \$2,250.00 – October and ½ of November rent

The Landlord stated that the Tenant failed to pay any rent for October or November and he suffered a rental loss for these months. The Landlord stated that he was able to quickly re-rent the unit for mid-November, but he still received no rent from the Tenant for October or the first half of November.

- 2) \$1,950.00 – Liquidated damages and late rent fee

The Landlord is seeking \$1,500.00 in liquidated damages, pursuant to the following clause in the addendum of the tenancy agreement:

**Liquidated damages:** If Tenant ends the fixed term tenancy before the original term as set out in the tenancy agreement, the landlord may treat this agreement as being at an end. In such an event, an equivalent of one month's rent will be paid by the Tenant to the Landlord as liquidated damages, and not as a penalty, to cover the Landlords cost of re-renting the rental unit and must be paid in addition to any other amounts owed by the tenant, such as unpaid rent or for damage to the rental property.

The rent is due in full on or before the 1st day of each month. Any amount of late rent will carry a late fee of \$20.00, or \$10 per day until fully paid, whichever is greater. An additional charge of \$50 will be levied in the event of a cheque returned NSF. It is a fundamental breach of the Residential Tenancy Agreement if you fail to pay the rent when due. An eviction notice will be issued on the 10th day of the month if rent in full has not been paid on or before the 10th day of that month.

### Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

In this instance, the burden of proof is on the Landlord to prove the existence of the damage/loss and that it stemmed directly from a violation of the *Act*, regulation, or tenancy agreement on the part of the Tenants. Once that has been established, the Landlords must then provide evidence that can verify the value of the loss or damage. Finally it must be proven that the Landlord did everything possible to minimize the damage or losses that were incurred.

I find it important to note the following portion of the Act:

#### **Tenant's notice**

**45** (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.

I find the Tenants were not legally entitled to end the tenancy in the manner they did, and I find they breached section 45 of the Act and the fixed term tenancy agreement when they gave notice and moved out prior to the end of the fixed term.

The undisputed evidence is that the Tenant failed to pay any rent for either October or November. I note the Tenant did not move out until November 5, 2021. The Landlord was able to quickly mitigate the lost rent for November, by finding new Tenants as of

November 15, 2021. I find the Landlord sufficiently mitigated his loss in that regard, and I find the Tenant is liable for October and half of November rent, totalling \$2,250.00.

I turn to the Landlord's claim for liquidated damages. Residential Tenancy Policy Guideline 4 provides for liquidated damages as follows:

*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.*

In this case, I find that the liquidated damages clause in the tenancy agreement is an enforceable term, as it is not extravagant compared to what rental losses could have been incurred following premature termination of the agreement. I find the amount of 1 month's worth of rent is not punitive, such that the clause is not enforceable. This term was agreed to up front. I award the full amount of this item, \$1,500.00.

With respect to the late rent fee, I note the following portion of the Regulations:

**Non-refundable fees charged by landlord**

- 7 (1)A landlord may charge any of the following non-refundable fees:
- (d)subject to subsection (2), 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;

Pursuant to the above regulation, I decline to award a \$450.00 late rent fee, as claimed, and only award late fees totalling \$50.00, which is a fee of \$25.00 for October, and \$25.00 for November.

Section 72 of the Act gives me authority to order the repayment of a fee for an application for dispute resolution. As the Landlord was substantially successful with his application, I order the Tenants to repay the \$100.00 fee that the Landlord paid to make application for dispute resolution. Also, I authorize the Landlord to retain the security and pet deposit to offset the other money owed.

In summary, I find the Landlord is entitled to the following monetary order:

<b>Item</b>	<b>Amount</b>
Total of items claimed	\$3,800.00
PLUS: Filing Fee	\$100.00
Subtotal:	\$3,900.00
LESS: Security Deposit	\$750.00
<b>Total Amount</b>	<b>\$3,150.00</b>

### Conclusion

The Landlord is granted a monetary order in the amount of **\$3,150.00**, as specified above. This order must be served on the Tenant. If the Tenant fails to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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 *Residential Tenancy Act*.

Dated: June 14, 2022

Residential Tenancy Branch