Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNRL-S MNDCL-S FFL

Introduction

This hearing was convened as a result of the landlord's Application for Dispute Resolution (application) seeking remedy under the *Residential Tenancy Act* (Act). The landlord applied for a monetary order in the amount of $6,807.50 for unpaid rent or utilities, for money owed or compensation for damage or loss under the Act, regulation or tenancy agreement, to retain the security deposit and pet damage deposits to offset any amount owing, and to recover the cost of the filing fee.

Landlord agent PP (agent), tenant LS (tenant), and an agent for the tenant, PS (tenant agent) appeared at the teleconference hearing and gave affirmed testimony. During the hearing the parties were given the opportunity to provide their evidence orally. A summary of the evidence is provided below and includes only that which is relevant to the hearing.

Neither party raised any concerns regarding the service of documentary evidence. The parties confirmed that they received and reviewed the documentary evidence from the other party prior to the hearing. I find the parties were sufficiently served in accordance with the Act as a result. Words utilizing the singular shall also include the plural and vice versa where the context requires.

Preliminary and Procedural Matter

Both parties confirmed their respective email addresses during the hearing and were advised that the Decision will be emailed to both parties.

Issues to be Decided

- Is the landlord entitled to a monetary order under the Act, and if so, in what amount?
- What should happen to the tenant's combined deposits under the Act?
- Is the landlord entitled to the recovery of the cost of the filing fee under the Act?

Background and Evidence

A copy of the tenancy agreement was submitted in evidence. A fixed-term tenancy began on October 1, 2021, and was scheduled to convert to a month-to-month tenancy after September 30, 2022. The monthly rent was $2,870.00 per month and was due on the first day of each month. The tenant paid a security deposit of $1,435.00 and a pet damage deposit of $1,435.00, which is $2,870.00 in combined deposits (combined deposits) at the start of the tenancy, which the landlord continues to hold.

The landlord's monetary claim of $6,807.50 is comprised of the following:

ITEM DESCRIPTION	AMOUNT CLAIMED
1. Loss of November rent	$2,870.00
2. Loss of December rent	$2,870.00
3. Rent incentive	$967.50
4. Filing fee	$100.00
TOTAL	**$6,807.50**

Regarding items 1 and 2, the landlord has claimed $2,870.00 for unpaid rent for the months of November and December 2021. The agent also requested to increase their monetary claim at the hearing to $22,900.00 as they have been unable to re-rent the rental unit, according to the agent. I will address the agent's request later in this Decision.

The tenant confirmed that they viewed the rental unit before signing the tenancy agreement on September 9, 2021, and picking up the rental unit keys on October 1, 2021. The tenant also paid the combined deposits of $2,870.00. The tenant's agent submitted a document listed below, which I have included in part with the argument that a tenancy agreement was never formed as follows:

Preliminary Procedural Issue: Determine whether or not the Residential Tenancy Act (the "Act") applies to the fact situation in this Application.

Section 2(1) of the Act provides that the Act applies to "tenancy agreements". Section 1 defines "tenancy agreement" as an "agreement" between a landlord and a tenant. As such the Act applies only if a valid agreement exists between the parties.

It has been well established judicially that in order for a valid agreement or contract to be created in law, certain conditions must be met. A valid and operative contract is an agreement free from vitiating factors such as mistake or misrepresentation. There must be unequivocal consensus between the contracting parties as to exactly what is being agreed to.

[redacted] did not consent to leasing a unit in a below market social housing Moderate Income Rental property. Maple failed to disclose this fact during negotiations. It was a material misrepresentation for Maple to market the property as "luxury rental apartment" and continue to do so even after [redacted] clearly specified her requirements and stated her concerns about safety and privacy. During negotiations Maple failed to disclose that tenants transitioning from shelters and their occupants would have unrestricted access to the courtyard. [redacted] did not consent to leasing a ground floor unit with a patio space opening up directly onto a private courtyard that was not secure.

[redacted] relied on material representations about the property made by Maple to arrive at her understanding of the agreement to lease. These representations were either incorrect or false. [redacted] and Maple were not in consensus or "Ad Idem" as to the subject matter of the agreement to lease. No valid lease agreement was formed. No relationship of landlord and tenant was created. Maple has not provided evidence for consideration to the contrary.

[Personal information redacted to protect privacy]

I will address this matter later in this Decision. The tenant testified that they did a search online on October 1, 2021 and found that the rental building was a below market social housing moderate income rental unit even though it was marketed as a "luxury rental apartment" and made reference to not consenting to leasing a ground floor unit with patio space opening directly onto a private courtyard that was not secure.

The tenant admitted that they did not write to the landlord to address these issues and instead returned the rental unit keys on October 1, 2021 and made the decision not to move into the rental unit.

The agent stated that the tenant viewed the rental unit before signing the tenancy agreement and paying the combined deposits and only changed their mind when they were given the keys on October 1, 2021.

The agent was asked if there was any evidence to support that this rental unit was advertised for a new tenant, once the tenant returned the rental unit keys and the agent confirmed the specific rental unit was not listed for rent and instead provided a list of units available for rent in the building by way of a document entitled “Availability”.

Regarding item 3, the landlord has claimed $967.50, which the agent called a rent incentive that was deducted from the first month of rent, and which was also to be deducted from the last month of rent. The agent referred to clause 42 of the tenancy agreement (clause 42), which states as follows:

42. OTHER.

- Cash payments for Rent or other building services are not permitted under any circumstances.
- Tenancy Agreement can only be amended in writing by the Senior Property Manager.
- **The Tenant shall receive a rental credit of $250.00 to be applied towards October 2021 rent.**
- The Tenant shall not be required to pay 1/2 month's rent to be split evenly towards October 2021 and September 2022 rent.

The tenant did not agree to any portion of the landlord’s claim and as a result, I will address this item later in this Decision.

The agent stated that the amount of $967.50 was comprised of $250.00 for the “rental credit” for October 2021 and then ½ of $2,870.00 monthly rent is $1,435.00 which is split evenly between October 2021 rent and September 2022 rent, being $717.50 less for October 2021 and $717.50 less for September 2022 rent. Given the above, the rent owing for October would be $1,902.50, which was withdrawn from the tenant’s account as listed on the application.

The landlord is seeking to retain the tenant’s combined deposits of $2,870.00 and in terms of liquidated damages, the landlord did not account for that amount in their monetary claim but did refer to the liquidated damages clause 39 in the tenancy agreement, which reads as follows:

39. **LIQUIDATED DAMAGES.** If the Tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the term as set out in Clause 4 (A) or any subsequent fixed term, the Tenant agrees to pay the Landlord the greater of the rent due for the balance of the fixed term or the sum of one full month's Rent as Liquidated Damages and not as a penalty. Liquidated Damages are an agreed pre-estimate of the Landlords cost of re-renting the rental unit and must be paid in addition to any amounts owed by the Tenant, such as unpaid rent or damage to the rental unit or the residential property.

I will address the enforceability of the wording above later in this Decision.

I will also address the filing fee later in this Decision.

There was no evidence submitted that the tenant has provided their written forwarding address to the landlord as required by section 38 of the Act.

Analysis

Based on the testimony of the parties provided during the hearing, the documentary evidence and on the balance of probabilities, I find the following.

Test for damages or loss

A party that makes an application for monetary compensation against another party has the burden to prove their claim. The burden of proof is based on the balance of probabilities. Awards for compensation are provided in sections 7 and 67 of the *Act.* Accordingly, an applicant must prove the following:

1. That the other party violated the *Act,* regulations, or tenancy agreement;
2. That the violation caused the party making the application to incur damages or loss as a result of the violation;
3. The value of the loss; and,
4. That the party making the application did what was reasonable to minimize the damage or loss.

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 tenant. Once that has been established, the landlord must then provide evidence that can verify the value of the loss or damage. Finally, it must be proven that the landlord did what was reasonable to minimize the damage or losses that were incurred.

Where one party provides a version of events in one way, and the other party provides an equally probable version of events, without further evidence, the party with the burden of proof has not met the onus to prove their claim and the claim fails.

Firstly, I am not compelled by the tenant's submission that a valid tenancy agreement was not formed. A contract requires three things; 1. Offer, 2. Acceptance and 3. Consideration. I find the tenancy agreement satisfies all 3 requirements as the rental unit was viewed by the tenant, rent was established and agreed upon, and the combined deposits were paid, and the contract was signed. Therefore, I find a valid tenancy agreement exists between the parties. Furthermore, I find the tenant failed to exercise reasonable due diligence by waiting to do research regarding the rental unit, building or location until October 1, 2021, the same day they tenant received the rental unit keys, yet the tenant signed the tenancy agreement on September 9, 2021. In addition, I find that section 16 of the Act applies, which states:

> **Start of rights and obligations under tenancy agreement**
>
> **16** The rights and obligations of a landlord and tenant under a tenancy agreement take effect from the date the tenancy agreement is entered into, **whether or not the tenant ever occupies the rental unit.**
>
> [emphasis added]

Items 1 and 2 – Firstly, section 45(2) of the Act applies and states:

> 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.**
>
> [emphasis added]

Given the above, I find the tenant breached the fixed-term tenancy, as the earliest they could vacate the rental unit would have been September 30, 2022. Given the above, I find the tenant owed the amount of rent paid for October 2021, which was $1,902.50 after the discounts of $250.00 and $717.50 mentioned above.

Section 7(2) of the Act also applies and states:

> **Liability for not complying with this Act or a tenancy agreement**
>
> **7**(2) **A landlord** or tenant **who claims compensation for damage or loss that results from the other's non-compliance with this Act, the regulations or their tenancy agreement must do whatever is reasonable to minimize the damage or loss.**
>
> [emphasis added]

Given the above, I find the landlord failed to comply with section 7(2) of the Act by failing to provide sufficient evidence that the rental unit was actively advertised once the tenant returned the rental unit keys on or after October 1, 2021. I am not persuaded that a listed of "available" units provides any proof of advertising or that rent was reduced at any time to minimize their loss of rent. Therefore, I deny the landlord's request to increase the amount of their claim as I find that the landlord is not entitled to any additional rent other than October 2021 rent, which was already paid of **$1,902.50.** I also find that the landlord failed to meet part four of the four-part test for damages or loss described above. Given the insufficient advertising evidence before me, I dismiss any loss of rent for November 2021 and December 2021 or any month thereafter, without leave to reapply.

Item 3 – Although the landlord has claimed $967.50, which the agent called a rent incentive that was deducted from the first month of rent, and which was also to be deducted from the last month of rent I find clause 42 of the tenancy agreement fails to include any wording regarding "incentive" and instead uses the word "credit", which I find does not require the tenant to repay the landlord. I find the wording of clause 42 simply means the tenant is given a credit of $250.00 for October 2021 rent, plus ½ of rent split between October 2021, which is $717.50 and the other portion the tenant is not entitled to, being September 2022, as the tenant breached a fixed-term tenancy and did not remain in the rental unit until September 2022.

Regarding liquidated damages, RTB Policy Guideline 4, *Liquidated Damages* (Policy Guideline 4) applies and states in part 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**.
>
> [emphasis added]

I find that Policy Guideline 4 takes a reasonable approach. Furthermore, clause 39 of the tenancy agreement states the following:

> 39. LIQUIDATED DAMAGES. If the Tenant ends the fixed term tenancy, or is in breach of the Residential Tenancy Act or a material term of this Agreement that causes the Landlord to end the tenancy before the end of the term as set out in Clause 4 (A) or any subsequent fixed term, **the Tenant agrees to pay the Landlord the greater of the rent due for the balance of the fixed term or the sum of one full month's Rent as Liquidated Damages and not as a penalty. Liquidated Damages are an agreed pre-estimate of the Landlords cost of re-renting the rental unit and must be paid in addition to any amounts owed by the Tenant, such as unpaid rent or damage to the rental unit or the residential property.**
>
> [emphasis added]

I find the portion I have bolded above is unenforceable based on the following. When a landlord writes "the greater of the rent due for the balance of the fixed-term or the sum of one full month's Rent", I find the 2 amounts are either $25,830.00 (comprised of November 2021 to July 2022, the latter of which was the month of the hearing,

inclusive, which totals 9 months at $2,870.00) or $2,870.00, and that the landlord has failed to prove that a range between $25,830.00 and $2,870.00 is anything more than a comparison between one month of rent and 9 months of rent. Therefore, I find that these amounts are not a genuine pre-estimate of the costs to re-rent the rental unit and are instead a **penalty**. I also find this clause to be oppressive to the tenant and is unenforceable under the Act.

As the landlord's claim has no merit, I do not grant the cost of the filing fee.

The tenant has one year from October 1, 2021, to provide their written forwarding address to the landlord pursuant to section 38 of the Act.

Conclusion

The landlord's claim fails in its entirety.

The tenant has one year from October 1, 2021, to provide their written forwarding address to the landlord pursuant to section 38 of the Act.

This decision will be emailed to both parties.

This decision is final and binding on the parties, unless otherwise provided under the Act, and 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: July 20, 2022

Residential Tenancy Branch