



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding ATIRA PROPERTY MANAGEMENT
INC. and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCL-S, MNDL-S, FFL**

Introduction

This hearing dealt with the landlord's application pursuant to the *Residential Tenancy Act* (the *Act*) for:

- a monetary order for damages and loss pursuant to section 67;
- authorization to retain all or a portion of the tenant's security deposit pursuant to section 38; and
- authorization to recover the filing fee for this application from the tenant pursuant to section 72.

Both parties attended the hearing and were given an opportunity to be heard, to present sworn testimony, to make submissions and to call witnesses. The landlord was represented by their agent (the "landlord"). In accordance with the *Act*, Residential Tenancy Rule of Procedure 6.1 and 7.17 and the principles of fairness and the Branch's objective of fair, efficient and consistent dispute resolution process parties were given an opportunity to make submissions and present evidence related to the claim. The parties were directed to make succinct submissions, and pursuant to my authority under Rule 7.17 were directed against making unnecessary submissions or remarks not related to the matter at hand.

The parties were made aware of Residential Tenancy Rule of Procedure 6.11 prohibiting recording dispute resolution hearings and the parties each testified that they were not making any recordings.

The tenant testified that they received the landlord's materials and based on the testimony I find them duly served with the materials in accordance with sections 88 and 89 of the *Act*.

The landlord disputed that they have been served with the tenant's evidence. The tenant testified that they had served the landlord by registered mail but failed to provide a valid Canada Post tracking receipt, a tracking number or cogent details regarding when they mailed their package. Based on the paucity of evidence I am not satisfied that the tenant has served the landlord with their evidence in a manner consistent with the Act and Rules of Procedure or at all.

Nevertheless, I find that consideration of the tenant's package, which consists of 2 pages of typewritten submissions and 2 screenshots of bank statements, will not be contrary to the principles of procedural fairness nor prejudicial to the landlord. The landlord did not object to the consideration of the tenant's evidence and was prepared to proceed with the present hearing on the basis of the description of the contents of the documentary materials. Accordingly, pursuant to my authority under Rule 3.17 I allow the inclusion of the tenant's evidence and proceeded with the hearing.

Issue(s) to be Decided

Is the landlord entitled to the relief sought?

Background and Evidence

While I have turned my mind to all the documentary evidence and the testimony of the parties, not all details of the respective submissions and arguments are reproduced here. The principal aspects of the claim and my findings around each are set out below.

The parties agree on the following facts. This fixed-term tenancy began on September 1, 2021 and was scheduled to end on August 31, 2022. The monthly rent was \$1,745.00 payable on the first of each month. A security deposit of \$872.50 was collected at the start of the tenancy and is still held by the landlord.

The signed tenancy agreement contains a Liquidated Damage Clause on the first page of the agreement which states:

If the Tenant breaches a material term of this Agreement that causes the Landlord to end the tenancy before the end of any fixed term, or if the Tenant provides the Landlord with notice, whether written, oral or by conduct, of an intention to breach this Agreement and end the tenancy by vacating, and does vacate before the end of any fixed term, the Tenant will pay to the Landlord the

sum of \$1,200.00 as liquidated damages and not as a penalty for all costs associated with re-renting the Rental unit. Payment of such liquidated damages does not preclude the Landlord from claiming future rental revenue losses that will remain unliquidated.

The parties agree that the tenancy ended on November 29, 2021. The landlord seeks liquidated damage in the amount of \$1,200.00 as provided in the signed tenancy agreement.

The tenant submits that they believe the liquidated damage clause is unenforceable and says:

The Liquidated Damage clause is not supported by the standard term tenancy agreement Provision. Furthermore, the liquidated Damage clause spelled out in the tenancy agreement punishes only the tenant for the financial gains of the landlord. The landlord forced this clause into the contract or he otherwise would not rent the unit to me, and I as the tenant needing residence have no bargaining power. The landlord's action is like a robber, taking advantage of me by forcing me to agree to unfavorable terms and conditions and illegally taking my money

The tenant provided a forwarding address in writing on December 10, 2021. The landlord filed the present application which includes seeking authorization to retain the deposit on December 13, 2021.

The landlord submits that they took reasonable steps including cleaning the rental unit after the tenant vacated, advertising the rental unit and vetting potential occupants in order to re-rent the suite. The landlord submits that despite their best efforts they incurred some rental income losses as the new occupant took possession of the rental unit on December 20, 2021. The landlord calculates the rental income loss from December 1st to 19th as \$1,163.00 and seeks a monetary award in that amount.

The landlord submits that there is a credit for the tenancy in the amount of \$872.50 from overpayment made during the tenancy. The landlord provided detailed testimony regarding the amounts received from the tenant on specific dates.

The tenant calculates that there should be a credit of \$1,745.00 total in addition to their security deposit for this tenancy. The tenant submits that they paid a security deposit at the outset of the tenancy and subsequently paid full rent throughout the tenancy and on

December 1, 2021 when the tenancy had ended. The tenant submitted two screenshots of their bank statement for the months of November and December 2021 in support of their position. The bank statement shows that a sum of \$1,745.00 to the landlord was returned NSF on November 4, 2021. A sum of \$1,740.00 appears to have been paid to the landlord on December 1, 2021.

Analysis

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. In order to claim for damage or loss under the *Act*, the party claiming the damage or loss bears the burden of proof. The claimant must prove the existence of the damage/loss, and that it stemmed directly from a violation of the agreement or a contravention of the *Act* on the part of the other party. Once that has been established, the claimant must then provide evidence that can verify the actual monetary amount of the loss or damage.

As outlined in Residential Tenancy Policy Guideline 4, a liquidated damage clause is an agreement in advance for the payment of a genuine pre-estimate of losses in the event of a breach of the tenancy agreement.

I find that the amount of the damage, the circumstances in which the amount becomes payable and the landlord's explanation of how the amount was pre-estimated to be sufficient to establish that this is a true liquidated damage clause and not a penalty clause.

I do not find the tenant's submissions to be particularly convincing or persuasive. I find no evidence that there was any undue duress or coercion in the formation of the tenancy agreement. I find the clause shows that the parties agreed that the landlord would be able to claim compensation when the tenant breaches the agreement.

Residential Tenancy Policy Guideline 4 provides that:

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.

Accordingly, I find it unnecessary to consider the actual costs incurred by the landlord due to the early end of the tenancy agreement. I find that the clause in the tenancy

agreement signed by the parties to be a valid and enforceable liquidated damage clause. I accept the evidence of the parties that the tenancy ended before the full term due to breaches on the part of the tenant and as a result the tenant is obligated to pay the amount of \$1,200.00, stipulated as liquidated damages.

I accept the evidence of the landlord that they incurred some rental income losses for the month of December 2021 despite taking reasonable steps to mitigate their losses. I accept the evidence that the value of the loss is \$1,163.00 and issue a monetary award in that amount accordingly.

I find little evidence in support of the tenant's submission regarding the amount of rent paid or credit for their tenancy. I find the tenant's own documentary evidence shows that rent was not paid in the month of November 2021 as there was insufficient funds. I find the tenant's submission that they paid a security deposit at the start of the tenancy is not demonstrated in any documentary materials and in the context of their other claims of payment which are contradicted in their own evidence, is of little credibility and probative value.

I find that the landlord gave cogent, consistent and detailed testimony regarding the account for this tenancy. I find the landlord's submission that the tenant failed to provide a security deposit initially and that the subsequent amount paid was applied to their deposit and a credit to be more reasonable and convincing. Accordingly, I accept the landlord's position that there is a credit of \$872.50 for this tenancy.

As the landlord was successful in their application they are entitled to recover the filing fee from the tenant.

In accordance with sections 38 and the offsetting provisions of 72 of the *Act*, I allow the landlord to retain the tenant's security deposit and credit for this tenancy in partial satisfaction of the monetary award issued in the landlord's favour

Conclusion

I issue a monetary order in the landlord's favour in the amount of \$718.00 on the following terms:

Item	Amount
Liquidated Damage	\$1,200.00
Loss of Rental Income	\$1,163.00
Filing Fee	\$100.00
Less Security Deposit	-\$872.50
Less Credit on Account	-\$872.50
TOTAL	\$718.00

The tenant must be served with this Order as soon as possible. Should the tenant fail to comply with this Order, this Order may be filed in the Small Claims Division of the Provincial 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 *Residential Tenancy Act*.

Dated: July 18, 2022

Residential Tenancy Branch