Dispute Resolution Services

Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes

File #310060060: MNDCL-S, FFL
File #310059310: MNSDS-DR, FFT

Introduction

The Landlord seeks the following relief under the *Residential Tenancy Act* (the "*Act*"):

- a monetary order pursuant to s. 67 for compensation for losses and claims against the security deposit; and
- return of their filing fee pursuant to s. 72.

The Tenants filed a cross-application in which they seek the following relief under the *Act*:

- return of their security deposit pursuant to s. 38; and
- return of their filing fee pursuant to s. 72.

The Tenants filed their application as a direct request, but their matter was scheduled for hearing in light of the Landlord's application.

R.M. appeared as agent for the Landlord. D.B. and T.B. appeared as the Tenants.

The parties affirmed to tell the truth during the hearing. I advised of Rule 6.11 of the Rules of Procedure, in which the participants are prohibited from recording the hearing. The parties confirmed that they were not recording the hearing. I further advised that the hearing was recorded automatically by the Residential Tenancy Branch.

The parties advise that they served their application materials on the other side. Both parties acknowledge receipt of the other's application materials without objection. Based on the mutual acknowledgments of the parties without objection, I find that pursuant to

s. 71(2) of the *Act* that the parties were sufficiently served with the other's application materials.

Issues to be Decided

1) Is the Landlord entitled to monetary compensation?
2) Are the Tenants entitled to the return of the security deposit?
3) Is either party entitled to the return of their filing fee?

Background and Evidence

The parties were given an opportunity to present evidence and make submissions. I have reviewed all written and oral evidence provided to me by the parties, however, only the evidence relevant to the issues in dispute will be referenced in this decision.

The parties confirmed the following details with respect to the tenancy:

- The Tenants took occupancy of the rental unit on May 1, 2021.
- The Landlord obtained vacant possession of the rental unit on December 31, 2021.
- Rent of $2,280.00 was due on the first day of each month.
- The Tenants paid a security deposit of $1,140.00 to the Landlord.

A copy of the tenancy agreement was put into evidence by the parties. The tenancy agreement shows that the tenancy was for a fixed-term ending on April 30, 2022 and was to continue on a month-to-month basis after the end of the term.

The Landlord's agent testified that the Tenant's gave improper notice to vacate the rental unit and ended the tenancy before the end of its term. The Landlord's agent confirmed that the rental unit was re-rented to a new tenant on January 1, 2022.

I was directed to clause 5 of the tenancy agreement which states the following:

> 5. **LIQUIDATED DAMAGES:** If the tenant ends the fixed term tenancy before the end of the original term as set out in (C) above, the landlord may, at the landlord's option, treat this Agreement as being at an end. In such event, the sum of $ 2280 will be paid by the tenant to the landlord as liquidated damages, and not as a penalty, to cover the administration costs of re-renting the rental unit. The landlord and tenant acknowledge and agree that the

> payment of liquidated damages will not preclude the landlord from exercising any further right of pursuing another remedy available in law or in equity, including, but not limited to, damage to the rental unit or residential property and damages as a result of lost rental income due to the tenant's breach of any term of this Agreement.

The Landlord's agent submitted that the Landlord seeks enforcement of the liquidated damages clause in light of the administrative costs associate with re-renting the property. The Tenants disputed that they should be required to pay the Landlord for ending the tenancy.

The Landlord's agent further advised that the Landlord seeks cleaning costs and carpet cleaning costs for the rental unit. The Landlord's evidence includes an invoice for carpet cleaning in the amount of $183.75 and an invoice dated $157.50 for cleaning the rental unit. The Landlord's agent indicated that the Tenants did not dispute these fees when they were discussed with them at the end of the tenancy.

The Tenants at first indicate that they disputed the cleaning costs for the rental unit, though later clarified that they did not dispute the cleaning costs, only the Landlord's request seeking enforcement of the liquidated damages clause.

The Landlord provides a copy of the condition inspection report, which indicates that the move-in inspection was conducted on April 30, 2021 and the move-out inspection on December 31, 2021. On both occasions, the parties signed and dated the inspection report. The inspection report shows that Tenants agreed the report was accurate when it was signed.

The Landlord's agent testified to a terse exchange between he and D.B. at the move-out inspection after the agent advised that the Landlord would be seeking enforcement of the liquidated damages clause. The agent says that D.B. stormed off.

D.B. does not deny the exchange during the move-out inspection. However, he emphasized that the agent refused to accept his forwarding address during the move-out inspection. D.B. testified that agent told him to wait to provide the forwarding address until it was clear what the costs would be to clean the rental unit. The Tenants further testified that the agent failed to follow the proper process and that they did not receive a copy of the move-out inspection until it was served on them as evidence as part of the Landlord's application.

The Tenants confirmed that they provided their forwarding address to the Landlord on January 7, 2022. The Tenant's evidence includes an email in which they provide their forwarding address to the agent. The Landlord's agent confirms that the Tenant's provided their forwarding address on January 7, 2022.

Analysis

The Landlord claims against the security deposit for compensation. The Tenant's seek return of the security deposit.

Section 38(1) of the *Act* sets out that a landlord must within 15-days of the tenancy ending or receiving the Tenant's forwarding address, whichever is later, either repay a tenant their security deposit or make a claim against the security deposit with the Residential Tenancy Branch. A landlord may not claim against the security deposit if the application is made outside of the 15-day window established by s. 38(1). Under s. 38(6) of the *Act*, when a landlord fails to either repay or claim against the security deposit within the 15-day window, the landlord may not claim against the security deposit and must pay the tenant double their deposit.

Upon review of the information on the Landlord's application and in consideration of Rule 2.6 of the Rules of Procedure, I find that the Landlord filed their application on January 18, 2022.

The Tenants argue that the Landlord refused to accept their forwarding address on December 31, 2021. I find this argument to be unpersuasive. D.B. acknowledges being present at the move-out inspection. At the bottom of the last page of the condition inspection report there is clearly a location in which he could have put the forwarding address. He signed the condition inspection report, which means he was in possession of a pen that permitted him to write in his forwarding address on the report itself. He did not do so.

Further, there was nothing preventing the Tenants from emailing the forwarding address sooner. Rather than doing so, they chose to provide their forwarding address on January 7, 2022, a point that is not in dispute. I find that the Tenant's provided their forwarding address on January 7, 2022 as confirmed in their evidence. Accordingly, I find that the Landlord filed their application within the 15-days permitted to them under s. 38(1) such that the doubling provision of s. 38(6) does not apply.

The Tenants indicate that the Landlord failed to provide a copy of the condition inspection report and only received it as evidence as part of the Landlord's application. This was not denied by the Landlord's agent.

I note that s. 18 of the Regulations requires a landlord to give the tenant a copy of the move-out condition report within 15 days of the date condition inspection report is completed or the date the landlord receives the tenants forwarding address in writing, whichever is later. Section 36(2)(c) of the *Act* is clear that should a landlord fail to do so their right to claim against the security deposit for damages to the rental unit is extinguished.

Policy Guideline #17 provides guidance with respect to security deposits and set-offs and states the following:

> 9. A landlord who has lost the right to claim against the security deposit for damage to the rental unit, as set out in paragraph 7, retains the following rights:
>   - to obtain the tenant's consent to deduct from the deposit any monies owing for other than damage to the rental unit;
>   - to file a claim against the deposit for any monies owing for other than damage to the rental unit;
>   - to deduct from the deposit an arbitrator's order outstanding at the end of the tenancy; and
>   - to file a monetary claim for damages arising out of the tenancy, including damage to the rental unit.

Presently, the Landlord's claim largely related to the enforcement of a liquidated damages clause, not damages to the rental unit. Policy Guideline #17 is clear that regardless of a landlord's right to claim against the security deposit for damages to the rental unit, they still retain the right to file a claim against the deposit for any monies owing other than damage to the rental unit and may still file a monetary claim for damages to the rental unit which arise from the tenancy. In other words, the question of whether the Landlord's right to claim against the security deposit for damages to the rental unit has been extinguished is of no consequence or bar to the present claim. The application of s. 36 of the *Act* is of no consequence and is not relevant.

Having said this, I caution the Landlord's agent to comply with all the formal requirements regarding the condition inspection report processes set out under the *Act*

and the Regulations. Under different circumstances, the results may be very different, including the potential application of the doubling provision under s. 38(6). However, that is not the case here.

Looking to the monetary claims, under s. 67 of the *Act* the Director may order that a party compensate the other if damage or loss result from that party's failure to comply with the *Act*, the regulations, or the tenancy agreement. Policy Guideline #16 sets out that to establish a monetary claim, the arbitrator must determine whether:

1. A party to the tenancy agreement has failed to comply with the *Act*, the regulations, or the 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.
4. The party who suffered the damage or loss mitigated their damages.

The applicant seeking a monetary award bears the burden of proving their claim.

Dealing first with the cleaning costs, the Tenants did not dispute these amounts. Section 37(2) of the *Act* requires tenants to leave the rental unit in a reasonably clean state upon moving out of the rental unit. The move-out condition inspection report shows that carpets needed cleaning as too did the rental unit's bathrooms. The Tenant signed the move-out report without objection nor were issues raised by the Tenants at the hearing.

I find that the Tenants failed to comply with their obligation under s. 37(2) of the *Act*, which resulted in financial loss to the Landlord in the amounts set out under the two invoices provided. The Landlord could not have mitigated its damages under the circumstances. I find that the Landlord has demonstrated that they are entitled to $341.25 for the cleaning costs ($183.75 (carpet cleaning) + $157.50 (rental unit cleaning)).

Looking next to the liquidated damages clause, Policy Guideline #4 provides guidance with respect to the enforceability of these clauses and states the following:

> 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.

I note that there is no dispute that the Tenants vacated the rental unit before the end of the term. The Tenant's own evidence includes a letter from them to the Landlord's agent dated December 4, 2021 which acknowledges as much. I further note that the amount set under clause 5 of the tenancy agreement is equivalent to one month's rent.

I find that the liquidated damages clause does not act as a penalty clause. It is valid. The sum listed under clause 5 is an entirely reasonable pre-estimate of damages for the Landlord. The amount listed is neither extravagant nor oppressive. There may have been administrative costs, such as time and credit checks, to finding the new tenant, which is what clause 5 is intended to address.

The fact that the rental unit was re-rented on January 1, 2022 is irrelevant. The obligation to pay the liquidated damages clause flows from the tenant's contractual obligation under clause 5 rather than the obligation to pay rent. As made clear by Policy Guideline #4, if the clause is valid the tenant must pay the stipulated sum even when damages are non-existent.

I find that by ending the tenancy early, the Tenants triggered their obligation to pay the liquidated damages clause under clause 5 of the tenancy agreement. I find that the Tenants' refusal to do so is in breach of their contractual obligation under the tenancy agreement. Mitigation is not relevant under the circumstances. I find that the Landlord has established that they are entitled to $2,280.00 as listed in clause 5.

Given the amounts ordered, I dismiss the Tenant's application for return of their security deposit. The Tenant's were unsuccessful in their application. I find they are not entitled to the return of their filing fee.

The Landlord was successful in their application. I find that they are entitled to the return of their filing fee. Pursuant to s. 72(1) of the *Act*, I order that the Tenants pay the Landlord's $100.00 filing fee.

Pursuant to s. 72(2) of the *Act*, I direct that the Landlord retain the security deposit in partial satisfaction of the amount owed by the Tenants.

I make a total monetary order taking the following into account:

Item	**Amount**
Cleaning Costs	$341.25
Liquidated Damages	$2,280.00
Landlord's Filing Fee	$100.00
Less the security deposit to be retained by the Landlord	-$1,140.00
Total	$1,581.25

Conclusion

I dismiss the Tenants application without leave to reapply in its entirety.

The Landlord has established its monetary claim and is entitled to the return of its filing fee and to retain the security deposit.

Pursuant to ss. 38, 67, and 72 of the *Act*, I order that the Tenants pay **$1,581.25** to the Landlord.

It is the Landlord's obligation to serve the monetary order on the Tenants. If the Tenants do not comply with the monetary order, it may be filed by the Landlord with 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: August 31, 2022

Residential Tenancy Branch