



# Dispute Resolution Services

Page: 1

Residential Tenancy Branch  
Office of Housing and Construction Standards

A matter regarding Owner C/O Ambiance Property Management  
Inc. and [tenant name suppressed to protect privacy]

## **DECISION**

**Dispute Codes**      **MNRL-S, MNDCL-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 unpaid rent 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; and
- Authorization to recover the filing fee from the other party pursuant to section 72.

Neither of the tenants attended this hearing. The landlords were represented at the hearing by agents, AG and JG.

### **Preliminary Issue**

The landlords testified that they served the Notice of Dispute Resolution Proceedings package upon the tenant JS by leaving a copy of it at JS's residence with an adult person who apparently resides with the person. The landlords testified that they attended JS's residence on June 1<sup>st</sup> at 2:35 and spoke with JS who confirmed his identity and confirmed he resides at the address with his mother. When the landlord's agents returned to JS's residence on June 2<sup>nd</sup>, JS did not come to the door so the agents gave the Notice of Dispute Resolution Proceedings package to JS's mother.

Pursuant to section 88(1)

**Special rules for certain documents**

**89** (1)An application for dispute resolution or a decision of the director to proceed with a review under Division 2 of Part 5, when required to be given to one party by another, must be given in one of the following ways:

- (a)by leaving a copy with the person;
- (b)if the person is a landlord, by leaving a copy with an agent of the landlord;
- (c)by sending a copy by registered mail to the address at which the person resides or, if the person is a landlord, to the address at which the person carries on business as a landlord;
- (d)if the person is a tenant, by sending a copy by registered mail to a forwarding address provided by the tenant;
- (e)as ordered by the director under section 71 (1) [*director's orders: delivery and service of documents*];
- (f)by any other means of service provided for in the regulations.

Section 71(2)(c) states that the director may make an order that a document not served in accordance with section 88 or 89 is sufficiently given or served for purposes of this Act.

The tenant JS was not served in accordance with section 89(1), however I deem that by personally serving JS's mother with the Notice of Dispute Resolution Proceedings package, the tenant JS was sufficiently served on June 2<sup>nd</sup>, 2022 pursuant to section 71(2)(c) of the Act.

The landlord's agents testified they obtained the tenant MM's phone number from the building manager. They spoke with MM who verbally advised the landlord's agents of her forwarding address but the landlord's agents did not confirm she actually lived there. The landlords agents subsequently sent the Notice of Dispute Resolution Proceedings package to MM via registered mail on May 13, 2022 and provided the tracking number for the mailing. The landlords agent testified that the mailing was returned to them undelivered.

At the commencement of the hearing, I found that MM was not sufficiently served with the Notice of Dispute Resolution Proceedings package at her forwarding address, and I gave the landlord's agents the opportunity to withdraw their application, re-file and reserve their application or continue solely against the tenant JS. The landlords' agents opted to continue solely against the tenant JS. As the tenant MM was not served with

the Notice of Dispute Resolution Proceedings package, I dismissed the claim against her without leave to reapply.

Issue(s) to be Decided

Is the landlord entitled to a monetary order against the tenant?

Can the landlord recover the filing fee?

Can the landlords retain the tenants' security deposit?

Background and Evidence

The landlords gave the following undisputed testimony. The fixed term tenancy began on November 15, 2021, set to end on November 30, 2022. Rent was set at \$1,700.00 per month, payable on the first day of each month. A security deposit of \$850.00 was collected by the landlord which they continue to hold.

Clause 25 of the signed addendum to the tenancy agreement reads:

*The tenant agrees to pay the landlord the sum of \$1700 as liquidated damages and not as a penalty, to cover the administrative cost of re renting the said unit in the event that the tenant terminates the agreement before the expiry of the term. Payment of such liquidated damages does not preclude the landlord from claiming damages and future rental revenue losses that will remain unliquidated.*

The landlords agents testified that the tenants ended the fixed term tenancy by vacating the rental unit on or before April 12<sup>th</sup>. The landlord was in the process of putting together a 10 Day Notice to End Tenancy for Unpaid Rent/Utilities when the tenants abandoned the rental unit. The tenants did not pay rent for the month of April when they vacated it. The tenants did not give the landlord any written notice that they were ending the tenancy.

The landlords agents testified that the landlord was unable to obtain new tenants for the rental unit before the end of April and the landlord seeks full payment of rent for the month of April, 2022.

Analysis

Residential Tenancy Policy Guideline PG-4 deals with situations where a party seeks to enforce a clause in a tenancy agreement providing for the payment of **liquidated damages**.

*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.*

At the commencement of the tenancy, the tenant signed the tenancy agreement agreeing to clause 25, the liquidated damages clause. The fixed term tenancy ended before the stated end date when tenants vacated the rental unit and didn't notify the landlord about their intent to end it. The requisite criteria for granting the liquidated damages clause have been met.

In this case, the liquidated damages clause is intended to compensate the landlord for losses resulting from the costs of re-renting a unit after a tenant's breach of the tenancy agreement. The cost of re-renting a unit to a new tenant is part of the ordinary business of a landlord. Throughout the lifetime of a rental property, a landlord must engage in the process of re-renting to new tenants numerous times. However, one important reason why a landlord enters into a fixed term tenancy agreement is to attempt to limit the number of times the landlord must incur this cost.

I find it more likely than not that when a tenant breaches a fixed term tenancy agreement by ending the tenancy before the end of the fixed term, the landlord incurs

the costs of re-renting earlier than it would have been prior to the breach. This exposes the landlord to associated additional costs. For that reason, I find there is a loss to the landlord associated with the tenancy ending before the end of the fixed term caused by a breach of the tenancy agreement by the tenant.

The next question is whether \$1,700.00 meets the test of being a genuine pre-estimate of that loss. The landlord stated that the liquidated damages are to cover administrative costs of the rental advertisement and to show the unit to potential tenants. The tenant agreed to this pre-estimate in the tenancy agreement. Considering these factors, I am satisfied on a balance of probabilities that the landlord has established a claim against the tenant for the liquidated damages as a genuine pre-estimate of the costs associated with re-renting the unit and find the landlord is entitled to the monetary award against the tenant in the amount of \$1,700.00.

The tenant vacated the rental unit sometime on or about April 12<sup>th</sup> without paying April's rent. Section 26 of the Act requires that a tenant must pay rent when it is due under the tenancy agreement, whether or not the landlord complies with this Act, the regulations or the tenancy agreement, unless the tenant has a right under this Act to deduct all or a portion of the rent. I do not find the tenant had any right to deduct all or a portion of the rent owing to the landlord. Consequently, I find that as of April 1<sup>st</sup>, the tenant was obligated to pay rent in the amount of \$1,700.00 and failed to do so. The landlord is entitled to recover this rent and I award the landlord this amount pursuant to sections 7 and 67 of the Act.

As the landlord's application was 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 in the amount of \$850.00. In accordance with the offsetting provisions of section 72, the landlord may retain the tenant's entire security deposit in partial satisfaction of the monetary order.

<b>Item</b>	<b>Amount</b>
Liquidated damages claim	\$1,700.00
Rent for April 2022	\$1,700.00
Filing fee	\$100.00
Less security deposit	(\$850.00)
<b>Total</b>	<b>\$2,650.00</b>

Conclusion

I award the landlord a monetary order against the tenant JS in the amount of \$2,650.00.

The application against the tenant, MM is dismissed without leave to reapply.

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: January 16, 2023

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Residential Tenancy Branch