



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

A matter regarding DEVON PROPERTIES LTD
and [tenant name suppressed to protect privacy]

DECISION

Dispute Codes **MNDCL-S, FFL**

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution, made on May 5, 2022 (the "Application"). The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage, compensation, or loss;
- to retain the security deposit; and
- an order granting recovery of the filing fee.

The Landlord's Agent W.M. and the Tenants attended the hearing at the appointed date and time. At the start of the hearing the Tenants confirmed receipt of the Landlord's Application and documentary evidence package. I find these documents were sufficiently served pursuant to Section 71 of the *Act*.

The Tenants stated that they served their evidence to the Landlord by email on January 3, 2023. The Landlord's Agent stated that they did not receive the Tenants' evidence. The Tenants confirmed that they had not provided proof of service. The Tenants stated that they had regularly used email as a form of communication.

Preliminary Matters

Section 88 of the Act stipulates that documents such as evidence must be given or served 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 ordinary mail or 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 ordinary mail or registered mail to a forwarding address provided by the tenant;
- (e) by leaving a copy at the person's residence with an adult who apparently resides with the person;
- (f) by leaving a copy in a mailbox or mail slot for the address at which the person resides or, if the person is a landlord, for the address at which the person carries on business as a landlord;
- (g) by attaching a copy to a door or other conspicuous place at the address at which the person resides or, if the person is a landlord, at the address at which the person carries on business as a landlord;
- (h) by transmitting a copy to a fax number provided as an address for service by the person to be served; or
- (i) as ordered by an Arbitrator

According to the Residential Policy Guideline 12: A tenant or landlord must provide to the other party, in writing, the email address to be used. There is no prescribed form for doing so, but parties may want to use RTB-51 -“Address for Service” form and provide it to the other party.

If there has been a history of communication between parties by email, but a party has not specifically provided an email address for service purposes, it is not advisable to use email as a service method. If no other method of service is successful, a party may apply for a substituted service order (RTB-13 - Application for Substituted Service), asking for an order allowing service by email, and provide evidence of a history of communication between the parties at that email address. Parties may face delays or risk their application being dismissed if service is not effected in accordance with the legislation.

I find that the Tenants have provided no evidence that the parties previously agreed to using email as an approved form of service for tenancy related documents. As such, I find that the Tenant were required to serve their evidence to the Landlord in a manner outlined in Section 88 of the Act. As the Tenants have failed to serve the Landlord pursuant to Section 88 and that the Landlord's Agent stated that they have not received the Tenants' evidence, I find that the Tenants evidence will not be considered in this decision.

The parties were given an 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.

Issue(s) to be Decided

1. Is the Landlord entitled to a monetary order for damage, compensation, or loss, pursuant to Section 67 of the *Act*?
2. Is the Landlord entitled to retain the security deposit, pursuant to Section 38 and 72 of the *Act*?
3. Is the Landlord entitled to recover the filing fee, pursuant to Section 72 of the *Act*?
4. If the Landlord is not successful with their Application, are the Tenants entitled to the return of their deposits, pursuant to Section 67 of the *Act*?

Background and Evidence

The parties testified and agreed to the following; the fixed term tenancy began on August 25, 2021 and was meant to continue until August 31, 2022. Rent in the amount of \$2,200.00 was due to the Landlord on the first day of each month. The Tenants paid a security and a pet deposit, each in the amount of \$1,100.00, for a total of \$2,200.00 in deposits currently being held by the Landlord. The Tenancy ended early on April 30, 2022. The Landlord submitted a copy of the tenancy agreement in support.

The Landlord's Agent stated that the Landlord is seeking \$2,200.00 in liquidated damages as the Tenants ended their fixed term tenancy early. The Landlord's Agent referred to Section 18 of the Addendum to the tenancy agreement in which the parties had agreed to the liquidated damages clause which is equivalent to one month of rent.

The Landlord's Agent confirmed that he received the Tenants' notice to end tenancy on March 29, 2022 with an effective date of April 30, 2022. The Landlord's Agent stated that the liquidated damages cover the cost of re-renting the rental unit after the Tenants ended their fixed term tenancy early.

The Tenants responded by stating that they had experienced several issues during their tenancy which they had expressed to the property manager. The Tenants referred to

the Landlord's evidence which contained an email from the previous property manager dated October 8, 2021 which stated that:

"We continue to remind you that if you are this unhappy in our building, we are willing to accept your notice to vacate and waive the liquidated damages fee."

The Tenants stated that they began searching for a suitable rental unit as they were unhappy with their living situation. The Tenants expressed their difficulties finding a suitable accommodation given the limited rental market for a two-bedroom unit that would accommodate them having two large dogs. The Tenants stated that it wasn't until March 2022 that they found a new rental unit and provided the Landlord with sufficient notice to end tenancy. The Tenants stated that they only moved out as they were under the impression that they would not be required to pay the liquidated damages based on the email they had received from the property manager excusing them from paying it.

The Landlord's Agent stated that the offer was made to the Tenants in October 2021 and that it is unreasonable for the Tenants to expect that the offer would still stand 6 months later. The Landlord's Agent stated that the issues raised by the Tenants had been resolved by the time they vacated the rental unit. The Tenants stated that the issues persisted. The Landlord provided a copy of the email thread between the Tenants and the previous property manager in support.

Analysis

Based on the oral testimony and documentary evidence, and on a balance of probabilities, I find:

According to the Residential Policy Guideline #4; 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.

The Landlord is seeking \$2,200.00 for liquidated damages. I find that the Landlord has provided insufficient evidence to demonstrate that the issues the Tenant's were experiencing at the rental property had been resolved, or that the previous property manager's offer to waive the liquidated damage clause had expired or been revoked. Instead, I accept that the Tenants were unhappy at the rental property, and that the previous property manager had offered to accept the Tenants' notice to vacate and

waive the liquidated damages fee. I accept that the Tenants began searching for an alternate living accommodation which proved to be difficult given the fact they have two large dogs. I find that the Tenants decided to move from the rental unit with the understanding that they would not be required to pay the liquidated damages.

In light of the above, I dismiss the Landlord's claim to recover \$2,200.00 for liquidated damages without leave to reapply. As the Landlord was not successful with their Application, I find that they are not entitled to recover the filing fee.

I find that the Tenants are entitled to the full return of their security and pet damage deposit totalling \$2,200.00 which is currently being held by the Landlord. As such, I award the Tenants with a monetary order in the amount of \$2,200.00, pursuant to Section 67 of the *Act*. The Tenants are required to serve the monetary order to the Landlord as soon as possible and it may be enforced in small claims Court.

Conclusion

The Landlord's Application is dismissed without leave to reapply. The Tenants are granted a monetary order in the amount of \$2,200.00 which represents the full return of the Tenants' security and pet damage deposits.

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 17, 2023

Residential Tenancy Branch