



Dispute Resolution Services

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Residential Tenancy Branch
Office of Housing and Construction Standards

DECISION

Dispute Codes MNDC MNSD FF

Introduction

This hearing was convened as a result of the Landlord's Application for Dispute Resolution. The participatory hearing was held by teleconference on February 9, 2023. The Landlord applied for the following relief, pursuant to the *Residential Tenancy Act* (the "Act"):

- a monetary order for damage or loss under the Act;
- authorization to retain all or a portion of the Tenant's security deposit in satisfaction of the monetary order requested pursuant to section 38; and,
- to recover the cost of the filing fee.

Both parties attended the hearing and provided affirmed testimony. Both parties confirmed receipt of each other's documentary evidence. No service issues were raised.

Both parties were provided the 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

- Is the Landlord entitled to compensation for money owed or damage or loss under the Act?
- Is the Landlord entitled to keep the security deposit to offset the amounts owed by the Tenants?

Background and Evidence

Both parties agree that monthly rent was \$4,500.00, and was due on the first of the month. A copy of the lease agreement was provided into evidence, which shows that the tenancy was a fixed term 1 year lease starting on March 1, 2022. The Landlord's agent holds a security deposit totalling \$2,250.00.

The Landlord's agent stated that the Tenant approached her sometime in April 2022, and asked if she could get a dog. The owner of the property denied this request, so the Tenant decided they wanted to look elsewhere for a place to live, despite being in a lease. The Landlord's agent stated that the Tenant vacated the rental unit at the end of May 2022, and they successfully re-rented the unit as of June 1, 2022. The Landlord's agent stated that they did not lose any rent, but the owner had to incur some expenses to re-rent the unit.

The Landlord's agent provided a monetary order worksheet, which specifies that she is seeking the following 3 items:

- 1) \$4,500.00 – liquidated damages

The Landlord's agent pointed to clause #8 in the tenancy agreement addendum which states the following:

8. ENDING TENANCY:

- 1) If the Tenant ends the fixed term tenancy before the end of the original term as set out in the contract, the Landlord may, at the Landlord's option treat this Tenancy Agreement as being at an end. In such event, the sum of ONE month's rent shall 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 said premises. The Landlord and the Tenant acknowledge and agree that the payment of the said liquidated damages shall not preclude the Landlord from exercising any further right of pursuing any other remedy available in law or in equity, including but not limited to, damages to the premises and damages as a result of rental income due to the Tenant's breach of the term of this agreement.

The Landlord's agent stated that she is acting as an agent for the owner of the property, and she included this term because the owner has to incur costs to re-rent the property. The Landlord's agent stated that the Tenant agreed to the above term, and since the Tenants chose to break their 1 year lease early, they ought to be liable for this item. The Landlord's agent stated that the owner's actual cost for re-renting the unit was one half month's rent which is the fee he has to pay her for finding new replacement tenants.

The Landlord's agent stated there is no invoice for this amount yet because she is waiting for the outcome of this hearing before billing the owner for this amount. The Landlord's agent stated she has a contract with the owner for this fee but she did not provide a copy of any of this documentation.

The Tenant asserts that this amount is a penalty, and is not a genuine pre-estimate of the costs to re-rent. The Tenant also pointed out that the Landlord has provided no evidence to support her costs to re-rent, other than her statements around her fee to the Landlord for ½ months rent to find replacement tenants. The Tenant pointed out that there was no loss of rent. The Tenant also stated that the Landlord has failed to demonstrate what this fee is based on, so it is not possible to reasonably determine if its based on actual costs.

The Landlord's agent confirmed that the owner's only hard costs for re-rental was the fee he will have to pay her (1/2 months rent).

2) \$2,250.00 – Tenant placement fee

In addition to the liquidated damages clause above, the Landlord's agent is also seeking this fee because this is what the owner will have to pay her to procure new tenants. Although the Landlord's agent stated this amount has not been invoiced yet because she is awaiting the outcome from this hearing.

The Tenant does not feel she should be liable for this amount because it is essentially a duplication of what the liquidated damages clause is supposed to cover.

3) \$402.75 – Utility Fees

The Landlord provided a copy of the utility bills into evidence and stated that this is the amount the Tenant is liable for.

The Tenant agrees she owes this amount.

Analysis

A party that makes an application for monetary compensation against another party has the burden to prove their claim.

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 Tenants. 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 everything possible to minimize the damage or losses that were incurred.

I turn to the items on the Landlord's worksheet:

1) \$4,500.00 – Liquidated Damages

I note that the Tenants have agreed, in writing, as per the tenancy agreement provided into evidence, that the Landlord be paid 1 months' rent in compensation if the lease is ended prior to the end of the agreed upon term.

Residential Tenancy Policy Guideline 4 provides for liquidated damages 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.

In this case, I find that the liquidated damages clause in the tenancy agreement is not an enforceable term, as it does not appear to be a genuine pre-estimate of the costs to re-rent the unit. In making this determination, I note the Landlord's agent specifically stated that her fees are set, as per her agreement with the owner, and are one half month's rent to find new replacement tenants. The Landlord's agent stated that this is the owner's only fixed cost for re-renting the unit. If this is the amount that the Landlord could reasonably anticipate as a cost to re-rent the unit, then this amount should be the sum for the liquidated damages clause. It appears the Landlord set the liquidated damages clause at one month's rent, despite knowing the actual cost to re-rent would only be one half months rent. I am not satisfied this liquated damages clause is a genuine pre-estimate of the cost to re-rent, and I find this amount is a penalty and is not enforceable. I dismiss this item, in full, without leave.

2) \$2,250.00 – Tenant placement fee

I note it is not in dispute that the owner of the rental unit employs a rental agent to manage the unit and the tenants. Although there is no copy of the contract or agreement between the owner and the agent specifying that the owner will have to pay this amount to his agent to find new renters, I note the Landlord's agent provided an explanation for this. She stated that she does not have a receipt for this item because it has not yet been paid, and this fee amount is being held in trust pending the outcome of this hearing. I accept the Landlord's agent's testimony regarding this being a standard amount that most property managers charge when procuring new tenants and it is the amount she will charge in this instance. Using my knowledge, training, and experience as an Arbitrator, I find this amount appears reasonable.

I note the Tenants breached section 45(2) of the Act by ending the tenancy prior to the end of the fixed term agreement, and I find they ought to be liable for some of the losses incurred by the owner. I award this item, in full.

3) \$402.75 – Utility Fees

The Tenant agreed to pay this amount. I award this item in full.

Further, section 72 of the *Act* gives me authority to order the repayment of a fee for an application for dispute resolution. Since the Landlord was successful in this hearing, I also order the Tenant to repay the \$100.00 fee the Landlord paid to make the application for dispute resolution. I also authorize the Landlord to retain the security deposit in satisfaction of the amounts owed.

In summary, I find the Landlord is entitled to the following monetary order:

Item	Amount
Tenant placement fee	\$2,250.00
Utility bill	\$402.75
PLUS: Filing Fee	\$100.00
Subtotal:	\$2,752.75
LESS: Security Deposit	\$2,250.00
Total Amount	\$502.75

Conclusion

The Landlord is granted a monetary order in the amount of **\$502.75**, as specified above. This order must be served on the Tenant. If the Tenant fail to comply with this order the Landlord may file the order in the Provincial Court (Small Claims) and be 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: February 10, 2023

Residential Tenancy Branch